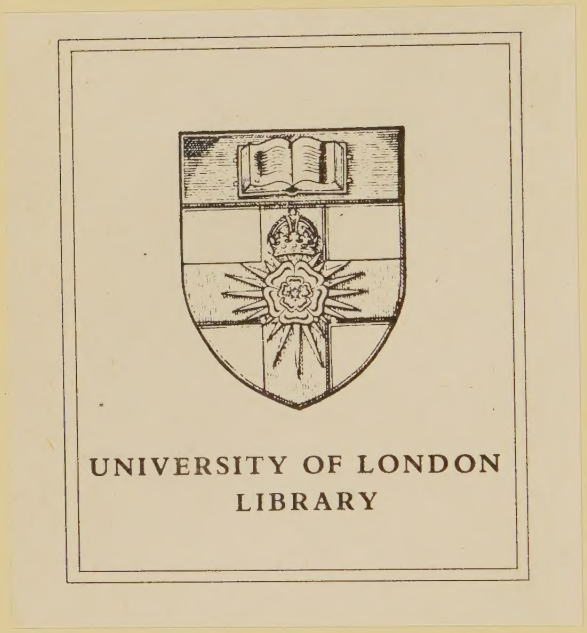
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4 Mx Wontt.



Digitized by the Internet Archive
in 2026

https://archive.org/details/irish-reports_1915_2

THE IRISH REPORTS.

1915 – Vol. II.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PB

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND.

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

J. G. THOMPSON,

BARRISTER-AT-LAW.

1915.

VOL. II.

THE KING'S BENCH DIVISION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,

BY E. PONSONBY, LTD.,

116, GRAFTON STREET.

1915.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS.

Lord Chancellor.

The Right Hon. Ignatius John O'Brien.

Lords Justices of Appeal.

The Right Hon. Hugh Holmes.

The Right Hon. John F. Moriarty.

The Right Hon. Stephen Ronan.

The Right Hon. Thomas Francis Molony.

King's Bench Division.

The Right Hon. Richard R. Cherry, L.C.J.

The Right Hon. Christopher Palles, C.B.

The Right Hon. John George Gibson.

The Right Hon. D. H. Madden.

The Hon. Walter Boyd.

The Right Hon. William Kenny.

The Right Hon. W. H. Dodd.

The Right Hon. Thomas Francis Molony.

The Right Hon. Jonathan Pim.

Attorneys-General.

The Right Hon. Jonathan Pim.

The Right Hon. John Gordon.

Solicitor-General.

James O'Connor, K.C.

[These Reports will be cited as follows :—[1915] 2 I. R.]

REPORTERS.

Court of Appeal,	R. St. J. Chadwick, James Moles, J G. Thompson.	Barristers-at-law.
King's Bench Division, and Court for Crown Cases Reserved,	C. Norman Kough, A. E. Clery, C. Lehane,	Barristers-at-law.
King's Bench Division (Probate),	William Lawson, A. H. Webb. T. C. Tobias.	Barristers-at-law.
King's Bench Division (Bankruptcy),	R. W. Lucas. E. C. Farran. D. M. Steen.	Barristers-at-law.

CORRIGENDA.

Page 101, line 11, *after* "*Yates* v. *Whyte*," *for* "(4)" *read* "(1)".

,, ,, foot-notes, *delete* "(4) *Ib.* 284."

,, 310, last line of head-note, *for* "appearing in the action" *read* "of the motion".

,, 411, line 11 of head-note, *for* "Order LXXIV" *read* "Order LXXXIX."

,, 453, line 14, *for* "*Waugh* v. *London County Council*" *read* "*Warr* v. *London County Council*".

MEMORANDA.

On the 5th February, 1915, STEPHEN RONAN, Esq., K.C., was appointed a Judge of His Majesty's Court of Appeal in Ireland, in the room of LORD JUSTICE HOLMES, resigned.

On the 2nd May, 1915, the RIGHT HON. LORD JUSTICE MORIARTY died.

On the 1st June, 1915, the RIGHT HON. THOMAS FRANCIS MOLONY was appointed a Judge of His Majesty's Court of Appeal in Ireland.

On the 17th June, 1915, the RIGHT HON. JONATHAN PIM, His Majesty's Attorney-General for Ireland, was appointed a Judge of the King's Bench Division of the High Court of Justice in Ireland.

JOHN GORDON, Esq., K.C., was appointed His Majesty's Attorney-General for Ireland.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Allen & Sons, Billposting, Ltd., *v.* King, 213, 448
Alton *v.* Irvine, 72

B.

Ballymagauran Co-operative Agricultural and Dairy Society, Limited, *v.* Cavan and Leitrim (County Councils of), 85
Beirne *v.* Duffy (No. 2), 250
Belfast Corporation, R. (Montgomery) *v.* 36, 45
Belfast County Council *v.* Commissioner of Valuation, and Midland Railway Co. (Northern Counties Committee), 319, 328
Blumberg *v.* M'Cormick, 402
Bradshaw *v.* M'Mullan, 187
Burke, Department of Agriculture and Technical Instruction *v.* 128

C.

Carleton, In the Goods of, 9
Cavan and Leitrim (County Councils of), Ballymagauran Co-operative Agricultural and Dairy Society, Ltd. *v.* 85
Cleary *v.* London and North-Western Railway Co., 210
Commissioner of Valuation and Midland Railway Co. (Northern Counties Committee), Belfast County Council *v.* 319, 328
Conlin *v.* Patterson, 169
Cookman, Inland Revenue Commissioners *v.* 149
Crane & Sons *v.* Wallis, 411

D.

Department of Agriculture and Technical Instruction *v.* Burke, 128
Devaney *v.* Field, 180
Duffy, Beirne *v.* (No. 2), 250

F.

Field, Devaney *v.* 180
Fitzgerald, Perry *v.* 11
Frengley, In the Goods of, 1

G.

PAGE
Galway (Justices of), R. (Hastings) *v.* 8, note
Great Southern and Western Railway Company, Naas Urban District Council and Marum *v.* 14

H.

Hale, Sarah, In the Goods of, 362
Hastings *v.* O'Carroll, 4
Hazleton, a Bankrupt, *In re*, 425
Healy *v.* Spillane, 195, 208
———, ——— (No. 2), 423

I.

Inland Revenue Commissioners *v.* Cookman, 149
Irish Insurance Commissioners, O'Callaghan *v.* 262
Irish Insurance Commissioners, Westport Port and Harbour Commissioners *v.* 283
Irish Land Commission *v.* O'Neill, 66
Irvine, Alton, *v.* 72

J.

Joyce, Robert Watson & Co., Ltd., *v.* 123

K.

Keeffe *v.* M'Mahon, 312
——— *v.* Shaughnessy, 105
King, Allen & Sons, Bill-posting, Limited, *v.* 213, 448

L.

PAGE
Local Government Board, R. (Ballyvaghan Rural District Council) *v.* 55
London and North-Western Ry. Company, Cleary *v.* 210
Looby, Moloney *v.* 116
Lynch *v.* O'Regan, 267

M.

M'Carthy, M'Cowen (Robert) & Sons, *v.* 371
M'Cormick, Blumberg, *v.* 402
M'Cowen (Robert) & Sons, Ltd. *v.* M'Carthy, 371
Mackay, a Bankrupt, *In re*, 347
M'Mahon *v.* O'Neill, 384
———, Keeffe *v.* 312
M'Mullan, Bradshaw *v.* 187
Meehan *v.* Tynan, 52
Molloy *v.* Stack, 338
Moloney *v.* Looby, 116
Moriarty *v.* O'Donnell, 393
——— R. (Moore) *v.* 375

N.

Naas Urban District Council and Marum *v.* Great Southern and Western Railway Co., 14

O.

O'Callaghan *v.* Irish Insurance Commissioners, 262
O'Carroll, Hastings *v.* 4
O'Donnell, Moriarty *v.* 393
O'Neill, Irish Land Commission *v.* 66
O'Neill, M'Mahon *v.* 384
O'Regan, Lynch *v.* 267

P.

PAGE
Patterson, Conlin *v.* 169
Perry *v.* Fitzgerald, 11
Peters, Rigney *v.* 342
Pierce *v.* Wexford Picture House Company, Ltd., 310

R.

R. (Montgomery) *v.* Belfast Corporation, 36, 45
— (Hastings) *v.* Galway (Justices of), 8, note
— (Ballyvaghan Rural District Council) *v.* Local Government Board, 55
— (Moore) *v.* Moriarty, 375
— (Patterson) *v.* Tyrone (Justices of), 162
Rigney *v.* Peters, 342

S.

PAGE
Shaughnessy, Keeffe *v.* 105
Spillane, Healy *v.* 195, 208
———, ——— (No. 2) 423
Stack, Molloy, *v.* 338

T.

Tynan, Meehan, *v.* 52
Tyrone (Justices of), R. (Patterson) *v.* 162

W.

Wallis, Crane & Sons *v.* 411
Watson (Robert) & Co., *v.* Joyce, 123
Westport Port and Harbour Commissioners *v.* Irish Insurance Commissioners, 283
Wexford Picture House Co., Ltd., Pierce *v.* 310

TABLE OF CASES CITED.

A.

	PAGE
Ackroyd *v.* Smith,	464
Angerstein, *In re*; *Ex parte* Smith,	429
Anlaby *v.* Prætorius,	413, 414, 419, 420, 422
Anon. (1 Freeman 287),	2
Antrim Land Company *v.* Stewart,	154
Assicurazioni Generali de Trieste *v.* Empress Assurance Corporation, Ltd.,	88
Attorney-General v. Allen,	134
——— *v.* Howley,	67, 68, 71
——— *v.* Jameson,	152
——— *v.* Richmond (Duke of) (No. 1),	153
——— *v.* Robinson,	153

B.

Bailey *v.* Stephens,	463
Baily *v.* De Crespigny,	471, 477
Bank of Ireland *v.* Slattery,	191
Bannister *v.* Sullivan,	282
Bartlett *v.* Bartlett,	359
Barwick *v.* English Joint Stock Bank,	147
Bath's Case,	20
Bayard, In the Goods of,	3
Baynes & Co. *v.* Lloyd & Sons,	470
Beirne *v.* Duffy,	252, 259
Benwell, *Ex parte*; *In re* Hutton,	427, 434
Bew *v.* Bew,	125
Black *v.* Davis,	202
Blakemore *v.* Glamorganshire Canal Navigation,	46
Bogg *v.* Pearse,	264
Bond *v.* Trustees of Sterne,	202
Bradburn *v.* Great Western Railway Co.,	90, 101, 104
Bradley *v.* James,	350, 351, 355, 356
Brewin *v.* Short,	357, 358
Brigden *v.* Heighes,	254
Brooking *v.* Skewis,	191
Burgess *v.* Boetefeur,	171
Burke *v.* Donoghue,	189
Butler, *In re*,	350

C.

Caldwell, *Ex parte*; *In re* Currie,	351
Canning *v.* Farren,	118, 119, 120, 121, 122
Castle, *In re*,	425
Chaplain *v.* Southgate,	238
Chute *v.* Busteed,	202, 203, 204
Civil Service Co-operative Society, Ltd., *v.* General Steam Navigation Co.,	126
Clarke, *Ex parte*,	315
Clarke *v.* Inhabitants of The Hundred of Blything,	94, 95, 102, 103
Coleman *v.* Foster,	222, 225, 241, 249, 454, 470, 481
Collins, *Ex parte*; *In re* Rogers,	427
Colonial Bank *v.* Whinney,	349, 350, 351, 352
Combridge *v.* Harrison,	74, 83
Commissioners of Police *v.* Cartman,	133, 139, 142
Congested Districts Board *v.* Curry,	203
Conlan *v.* Carlow County Council,	222
Cooper *v.* Whittingham,	125

PAGE

Coppen *v.* Moore, . 133, 140, 142
Cowley (Earl) *v.* Inland Revenue Commissioners, . 152, 155, 158
Cox *v.* Bleines, . . . 343
Cresswell *v.* Cresswell, . . 54
Crump *v.* Lewis, . 109, 113, 270
Curran *v.* Midland Great Western Railway Co., . . . 358
Currie, *In re*; *Ex parte* Caldwell, 351

D.

Daly *v.* Edwardes, . . . 452
Daniel *v.* Freeman, . . 350
Darley *v.* The Queen, . . 380
Davy *v.* Gray, . . . 212
Davys *v.* Douglas, . . . 172
Derbyshire *v.* Houliston, . 135
Devitt *v.* M'Coy, . . . 52
Down (County Council of) *v.* Irish Insurance Commissioners, 290, 299, 306
Doyle, *In re*, ... 428
Drew *v.* Josolyne, . . 387, 390
Drury *v.* The Queen, . . 172
Dudley *v.* Folliott, . . . 224
Durell *v.* Gread, . . . 12, 13
Dyke, In the Goods of, . . 10, 11

E.

Eaglesfield *v.* Londonderry, . 20
Edwardes *v.* Barrington, 225, 452, 453, 480
Edwards *v.* Martell, . . 126
Egerton *v.* Lord Brownlow, . 429
Elfort, *In re*, . . . 428
English *v.* County Council of Kerry, ... 89, 90
Euston (Earl of) *v.* Seymour (Lord Henry), . . 366, 369

F.

Farley *v.* Higginbotham, 134, 136, 141, 148
Fitzgerald *v.* Firbank, . 460, 465
——— *v.* Hosford, . . 134
Flarty *v.* Odlum, . . . 429
Fletcher and Dyson, *In re*, . 425
Fogarty *v.* Dickson, . . 143
Folkestone Gas Co. *v.* Bowden, 399
Ford *v.* Miesche, . . . 413
Formby *v.* Barker, . . . 461

PAGE

Foss *v.* Best, ... 172
Foster *v.* Pierson, . . . 224
Fox *v.* Government of Newfoundland, . . . 68
Francke, *In re*, . . . 190
French *v.* Mitchell, . . 203
Frost *v.* Knight, . . . 459
Furlong *v.* Furlong, . . 52

G.

Garrett *v.* Bradley, . . 126
Gattward *v.* Knee, . . . 366
Gilbert *v.* Corporation of Trinity House, ... 69
Godley, In the Goods of, . 367, 370
Gorton Local Board *v.* Prison Commissioners, . . . 68
Graham *v.* Commissioners of Public Works, . . . 69
——— *v.* Furber, . . 351
Grand Trunk Railway Co. of Canada *v.* Jennings, . 89, 104
Grehan, *In re*, . . . 350
Greville-Smith *v.* Tomlin, 110, 113, 115, 270
Griffith *v.* Harries, . . 171

H.

Hall *v.* Lees, ... 300
Hamilton *v.* Casey, . . 202
Hamp-Adams *v.* Hall, 413, 414, 418, 422
Hardy *v.* Fothergill, . . 429
Hargreaves, *In re*, . . . 190
Harrison *v.* Muncaster, . . 240
Hart *v.* Porthgain Harbour Co., Limited, . . . 391, 393
Hayes, In the Goods of, . 366, 369
——— *v.* Bickerstaff, . 224, 238
Heap *v.* Hartley, . . 460
Heaphy, *In re*, . . . 172
Henley *v.* Lyne (Mayor of), . 299
Herron *v.* Rathmines & Rathgar Improvement Commissioners, 47
Heslop *v.* Baker, . . . 351
Hickey, *In re*, . . . 350
Hicks *v.* Newport Railway Co., 104
Higgins and Percival, *In re*, . 190
Hill *v.* Beckett, . . . 306
Hill *v.* Tupper, . 460, 465, 479
Hiscock, In the Goods of, 366, 369, 370

PAGE

Holford *v.* Bailey, . . 460
Holman *v.* Irvine, . . 306
Hornsby Urban Council *v.* Hennell, ... 68
Howe *v.* Smith, . . . 391
Huggins, *In re*, 427, 428, 436, 441
Hurrell, *In re*, . . . 427
Hurst *v.* Picture Theatres, Ltd., 218, 219, 220, 223, 225, 236, 248, 249, 456, 457, 460, 471
Hutton, *In re*; *Ex parte* Benwell, 427, 434

I.

Irish Insurance Commissioners *v.* Tipperary (County Council of), ... 290, 299
Irish Land Commission *v.* Ryan, 203

J.

Janson *v.* Driefontein Consolidated Mines, Limited, . . 429
Johannesburg Hotel Co., *In re*, 481
Jones, *In re*; *Ex parte* Lloyd, . 427
——— *v.* Belfast Corporation, 88, 91, 96, 97, 102, 103
——— *v.* Flint, ... 463
——— *v.* Scullard, . . 290
Judge *v.* Lowe, . . 225, 470

K.

Keeffe *v.* Shaughnessy, 268, 269, 270, 271, 276, 277, 278, 279, 281, 282, 315
Keenan *v.* Costello, . . . 282
Kelly *v.* Rattey, . . . 202
Kelly *v.* Watterson, . . 118
Kelner *v.* Baxter, . . . 226
Kenealy *v.* O'Keeffe, 343, 344, 345
Kerrison *v.* Smith, 219, 226, 237, 455

L.

Laffan *v.* Cashel Urban District Council, ... 89
Lancashire and Yorkshire Railway Co. *v.* Liverpool Corporation, ... 321
Lay, In the Goods of, . . 366
Lazarus *v.* Smith, . . . 405
Leech *v.* Schweder, . . . 225
Lingard *v.* Messiter, . 358, 359
Lloyd, *Ex parte*; *In re* Jones, 427
——— *v.* Grace Smith & Co., . 147

PAGE

London & North-Western Railway Co. *v.* Llandudno Improvement Commissioners, . 16
London & South-Western Railway Co. *v.* Gomm, . . 462
London Assurance Company *v.* Sainsbury, . . . 94
London County Council *v.* Allen, 461, 468, 476, 481
Lovering, *Ex parte*, . . 359
Lucas *v.* Harris, . . . 427
Lyon *v.* Weldon, . . 351, 354
Lyons *v.* Houghton, . . 343

M.

M'Guinness *v.* Toal, . . 118
M'Keown *v.* Henry, . . 118
MacMahon *v.* MacMahon, . 191
M'Manus *v.* Cooke, . . 463
M'Sheffrey *v.* Doherty, . . 204
Malet's Trusts, *In re*, . 350, 355
Malone *v.* Harris, . . 462
Manchester Corporation *v.* Manchester Racecourse Co., . 225
Mason *v.* Sainsbury, 89, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103
Massey *v.* Morris, . . . 134
Mennons *v.* Burke, . . . 203
Mersey Docks Trustees *v.* Gibbs, 69
Midland Assurance Co. *v.* Smith and Wife, ... 89
Millbourn *v.* Lyons, . 461, 481
Miller *v.* Salomons, . . 429
Milligan, In the Goods of, 367, 368
Mirams, *In re*, . . . 427
Moore *v.* Boyd, . . . 329
Morgan *v.* Metropolitan Railway Co., ... 47
Morrell *v.* Morrell, . . . 366
Morris *v.* Corbet, . . . 134
Moses *v.* Raywood, . . . 82
Moss, *Ex parte*, . . 387, 390
Mounsey *v.* Ismay, . . 464
Murguia, In the Goods of, . 3

N.

Nash *v.* Palmer, . . . 238
National Bank *v.* Cullen, . 53, 54
National Insurance Act, 1911, *In re* (Officers of South Dublin Union), . 263, 264, 266, 304
——— (Pupil Teachers and Monitors), ... 300
Neal, *In re*, ... 358

PAGE

Nell *v.* Longbottom, . 397, 401
Newman *v.* Bendyshe, . . 171
Nisbett and Pott's Contract, *In re*, ... 461
Nolan (Sergeant), *In re*, . 89
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Co., ... 429
North Sydney Investment and Tramway Co. *v.* Higgins, 226, 454, 481
Nuttall *v.* Bracewell, . . 465
Nutton *v.* Wilson, . 112, 277

O.

O'Carroll *v.* Hastings, . . . 108

P

Pain *v.* Boughtwood, . . 139
Palmer *v.* McNamee, . 117, 119
Parker, In the Goods of, . 366
Parkinson, *In re*, . . 68, 154
Petty *v.* Daniel, . . . 414
Phœnix Assurance Co. *v.* Spooner, ... 88
Pollard, *In re*, . . . 350
Porter *v.* Tottenham Urban District Council, . 225, 233, 240
Poulett *v.* Hill, . . . 189

R.

R. (Scottish Provident Institution) *v.* Belfast Corporation . 20
— *v.* Birmingham and Oxford Junction Railway Co., . 43
— *v.* Blenkinsop, . . . 20
— (M'Grath) *v.* Clare (Justices of), ... 171
— (Neely) *v.* Down (Justices of), ... 165
— *v.* Drury, . . . 171, 172
— (Hastings) *v.* Galway (Justices of), ... 8, 173
— *v.* Hampden, . . . 380
— (Gelston) *v.* Hedderman and Justices of Limerick, . 379
— (Mulgrew) *v.* Inland Revenue (Commissioners of), . . 171

PAGE

R. (Athy Urban District Council) *v.* Kildare (Justices of), 166, 167, 282
— (Ballycastle R.D.C.) *v.* Local Government Board, . . 59, 60
— *v.* London County Council, 315
— *v.* London Justices, . . 172
— (M'Swiggan) *v.* Londonderry (Justices of), . . . 166
— *v.* Lords Commissioners of the Treasury, . . . 428
— (Lambe) *v.* Louth (Justices of), ... 142
— *v.* M'Cann, . . . 69
— (Burke) *v.* M'Carthy, . 380
— *v.* Marsham, . . 170, 171
— (Vaughey) *v.* Meath (Justices of), ... 165
— *v.* Miles, ... 173
— *v.* Mills, ... 391
— (M'Kenna) *v.* Monaghan Urban District Council, 21, 23, 24, 25, 33, 34
— *v.* Rawlins, . . . 271
— (Madden) *v.* Roscommon (Justices of), . . . 108
— *v.* Rynd, ... 44
— (Roycroft) *v.* Schull Petty Sessions Districts (Justices of), ... 379
— *v.* Senior, . . 136, 138
— *v.* Simpson, . . 171, 173
— *v.* Stepney Corporation, . 47
— *v.* Suffolk Justices, . . 315
— (Richardson) *v.* Sweeney, 253, 340
— *v.* Taylor (3 B. & C. 502), ... 171
— (Patterson) *v.* Tyrone (Justices of), ... 170
— (Sheehan) *v.* Waterford (Justices of), . . . 166
Rae, In the Goods of, . . 366
Randal *v.* Cockran, . . . 95
Rangeley *v.* Midland Railway Co., ... 464, 479
Roberts, *In re*, . . . 429
——— *v.* Woodward, . 136, 138
Robinson *v.* Dixon, . . 142
Roe *v.* Woodward, . . 142
Roffey *v.* Henderson, . 225, 470
Rogers, *In re*, *Ex parte* Collins, 427
Rogers *v.* Hosegood, . . 221
——— *v.* Pittis, . . . 10
Ruby, The, . . . 351, 354
Russell *v.* Moore, . . . 13
——— *v.* Smith, . . 122
Rutter *v.* Everett, . . 357, 359
Ryley *v.* Brown, . . . 173

S.

PAGE
Saltash (Mayor of) *v.* Goodman
Sanderson *v.* Berwick (Mayor of), . . . 224, 239, 240
Saunders, *In re*, . . . 427
——— In the Goods of, 366, 369
Serrao *v.* Noel, . . . 191
Shaw, Savill, & Albion Co. *v.* Timaru Harbour Board, 290, 299
Sheffield County Council *v.* Blunt, ... 399
Shepherd *v.* Corporation of Norwich, ... 46
Sherras *v.* De Rutzen, . . 133
Shine, *In re*, . . . 429
Shuttleworth *v.* Le Fleming, . 463
Simpson *v.* Thompson, 90, 94, 96, 101
Sinton *v.* Dooley, . . 191
Skyring *v.* Greenwood, . . 20
Slater *v.* Brewsters, Ltd , 343, 344
Smart *v.* Jones, 231, 455, 472, 475, 476, 477, 481
Smith, *Ex parte*, *In re* Angerstein, ... 429
——— *v.* Colborne, . . 221
——— *v.* Kirk, . 388, 390, 391
——— *v.* Lambeth Assessment Committee, 219, 225, 245, 453, 479
——— *v.* Topping, . . 351
Smurthwaite *v.* Hannay, 414, 417, 422
Société Générale de Paris *v.* Walker, . . . 350, 359
Sparrow *v.* Hill, . . . 425
Spencer's Case, . . . 226
Stanfield *v.* Cubitt, . . . 351
Stedham, In the Goods of, 10, 11
Stephens, *Ex parte*, . . 165
Stephenson, *In re*, . . 350
Stickney *v.* Keeble, . . 391
Strabane Rural District Council, *Ex parte*, . . . 154
Stranks *v.* St. John, . . 469
Styan, *In re*, . . . 351

T.

Tassell *v.* Ovenden, . . 255
Taylor *v.* Nixon, 135, 136, 137, 140, 141, 142, 148
Tharsis Sulphur and Copper Co. *v.* M'Elroy, . . . 390
Thomas *v.* Sorrell, . . 225, 479
Tisdale *v.* Essex, . . . 224
Tolhurst *v.* Associated Portland Cement Manufacturers, . 222
Tooth *v.* Hallett, 388, 390, 391, 392

PAGE
Toppin *v.* Coleman, . 253, 255, 257
Tulk *v.* Moxhay, 221, 226, 455, 460, 461, 462, 466, 476

V.

Vaux's Case, . . . 171

W.

Wall *v.* City of London Real Property Co., Limited, . 232
Wallis *v.* Hands, . . . 224
——— *v.* Harrison . . 225
Wallis, Son, & Wells *v.* Pratt & Haynes, . . . 143
Walsall (Overseers of) *v.* London and North-Western Railway Co., ... 174
Warr *v.* London County Council, 225, 453, 479
Watkins, *Ex parte*, . . 359
Webber, *In re*, . . . 427
Welcome *v.* Upton, . 463, 464
Wemyss *v.* Hopkins, . . 170
Westmeath (Lord) *v.* Coyne, . 54
Westminster (Mayor, etc., of) *v.* Edgcome, . . . 20
Whaley *v.* Great Northern Railway Co., . 20, 21, 29, 328, 329
Wheeler *v.* Commissioners of Public Works, . . . 69, 71
Wicks, *In re*, . . 426, 434
Wild *v.* Woolwich Borough Council, ... 46, 47
Williams *v.* Gabriel, 221, 224, 241
——— *v.* Hunt, . 189, 190, 193
——— *v.* London and North-Western Railway Co., . 16
Wilmerson *v.* Lynn and Hamburg Steamship Co., 289, 300, 305
Wilson *v.* Tavener, 219, 225, 245, 453, 479
Wiseman, In the Goods of, . 366
Witham *v.* Hill, . . . 90
Wood *v.* Leadbitter, 220, 456, 457, 458, 460, 464
——— *v.* Lake, . . . 457
Wotton *v.* Hele, . . . 224

Y.

Yates *v.* Whyte, 89, 95, 96, 101, 103
Young *v.* Hope, . . . 353

CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1915.

IN THE GOODS OF JACOB FRENGLEY, DECEASED.

K. B. Div.
Probate.
1914.
Nov. 23.

Administration de bonis non—*Grant during Incapacity of surviving Executor —Transmission of Executorship.*

A grant for the use and benefit of an executor during his incapacity is equivalent to a grant of probate to him, and, should such executor survive his co-executor, the executor of the latter will not represent the original testator.

A testator appointed an executor and executrix. The executor proved the will, liberty to prove being reserved to the executrix. The executor died leaving an executor. The executrix survived, and became incapable of acting, and a grant *de bonis non* with the will annexed of the testator was made to a residuary legatee for the use and benefit of the executrix during her incapacity. The executrix died intestate, leaving assets of the testator unadministered. The residuary legatee applied for a grant *de bonis non* with the will annexed of the testator.

Held, that the grant for the use and benefit of the surviving executrix during her incapacity was equivalent to a grant of probate to her; that consequently the executor of the deceased executor did not represent the original testator; and that as the executrix had died intestate, a grant *de bonis non* should be made to the residuary legatee.

K. B. Div.
Probate.
1914.
IN THE GOODS OF FRENGLEY.

Ex parte application.

Jacob Frengley died on the 3rd April, 1910, having by his will appointed James Reilly, and Catherine Frengley the testator's wife, executors and trustees. James Reilly proved the will, liberty to prove being reserved to Catherine Frengley. James Reilly died on the 19th June, 1911, having appointed an executor who proved his will. Part of the personal estate of Jacob Frengley remained unadministered. Catherine Frengley being in bad health, on the 18th July, 1911, administration of the personal estate of Jacob Frengley remaining unadministered was granted to Marie Frengley, his daughter and residuary legatee under his will, for the use and benefit of Catherine Frengley pending her incapacity. Catherine Frengley died intestate on the 28th January, 1914, and on the 29th March, 1914, letters of administration of her personal estate were granted to Marie Frengley. It was necessary to raise representation to the personal estate of Jacob Frengley, for the purpose of transferring various stocks and shares and other property to trustees to carry out the trusts of his will.

Marie Frengley accordingly applied to the Court for an order that a grant of administration *de bonis non* of the personal estate of Jacob Frengley be granted to her.

Pigot, K.C., in support of the motion :—

No notice has been served on the executor of James Reilly—he does not represent the original testator, as Catherine Frengley survived James Reilly. Catherine Frengley did not prove the will of Jacob Frengley herself, but it is submitted that the grant to Marie Frengley during the incapacity of Catherine Frengley was equivalent to a grant of probate of the will to Catherine Frengley, and that the chain of executorship is to be traced through her, and not through James Reilly. If Catherine Frengley had appointed an executor, he would have represented the original testator, and no grant would have been necessary. There is no direct authority on the point, but it has been held that an administrator *durante minore ætate* of an executor of an executor is the representative of the first testator, for such an administrator is *in loco executoris*: Williams on Executors, 10th ed., pp. 181, 377, citing Anon. 1 Freeman 287.

So it was held that a grant to the attorney of an executor does not break the chain of representation, as a will proved by an attorney of an executor is the same thing as if actually proved by the executor: Williams on Executors, 10th ed., p. 181 (*c*), citing *In the Goods of Bayard* (1); *In the Goods of Murguia* (2).

MADDEN J. made the following order:—

On the motion of Mr. Pigot, K.C., counsel for Marie Frengley, and on reading copy motion paper filed the 20th November, 1914, and the copy affidavit of the said Marie Frengley, filed the same day, and the documents therein referred to, and the Court being of opinion that the grant of the 18th July, 1911, mentioned in the said affidavit, for the use and benefit of Catherine Frengley, the surviving executor of the deceased, was equivalent to a grant of probate to the said Catherine Frengley, and it appearing that the said Catherine Frengley has died intestate, it is ordered by the Court that the said Marie Frengley as one of the residuary legatees named in the will of the said Jacob Frengley, deceased, be at liberty to apply for a grant of letters of administration of the unadministered goods of the said deceased with his said will annexed; and it is ordered that the said Marie Frengley be entitled to her costs of this application with counsel out of the assets of the said deceased.

Solicitor for the applicant: *James H. Walsh.*

W. L.

(1) 1 Rob. 768. (2) 9 P. D. 236.

K. B. Div. 1914.

Nov. 25.

HASTINGS, Appellant; O'CARROLL, Respondent (1).

Local Government—Board of Guardians—Acting after having been disqualified—Previous Conviction within seven years—Local Government (Application of Enactments) Order, 1898, *Article* 12 (11)—*Local Government (Ireland) Act*, 1898, (61 & 62 *Vict. c.* 37) *s.* 94, *sub-s.* 3.

A person was convicted under the Local Government (Application of Enactments) Order, 1898, Article 12 (11), of having acted as a member of a board of guardians when disqualified, the disqualification being that within the preceding seven years he had been convicted of a similar offence. The conviction was challenged on the ground that Article 12 (11) of the Local Government (Application of Enactments) Order, 1898, did not include the disqualification resulting from conviction mentioned in sect. 94 (3) of the Local Government (Ireland) Act, 1898, and that the remedy of the prosecutor was a civil action under Article 11 (4) of the Local Government (Application of Enactments) Order, 1898.

Held, following *The King* (*Hastings*) v. *Justices of Galway* (note, *post*, p. 8), that the conviction was valid, and that Article 12 (11) of the Application of Enactments Order, 1898, included the disqualification mentioned in s. 94, sub-s. 3, of the Local Government (Ireland) Act, 1898 (2).

Case stated by justices under 21 & 22 Vict. c. 43.

At a petty sessions held at Ballinasloe on the 4th July, 1914, William Hastings was prosecuted by Nicholas O'Carroll, on a charge of having, on the 20th June, 1914, acted as a member of

(1) Before Cherry L.C.J. and Gibson and Kenny JJ.

(2) Local Government (Ireland) Act, 1898, s. 94 (3): "Any member of the council of a county, or county district, or board of guardians or commissioners of a town who, after the passing of this Act, is convicted of acting when disqualified, or of voting when prohibited, shall for a period of seven years after such conviction be disqualified for being elected or being a member of the same or any other such council, board, or commissioners."

Local Government (Application of Enactments) Order, 1898, Art. 12 (11): "If any person acts when disqualified or votes when prohibited under this Order, he shall for each offence be liable on summary conviction to a fine not exceeding twenty pounds, without prejudice to the disqualification enacted by sub-section three of section ninety-four of the Act."

the Ballinasloe board of guardians, he being then disqualified to act as such member by reason of having been convicted on February 18th, 1911, of acting as a member of the Ballinasloe urban council, and by reason of such conviction being disqualified for the period of seven years from July 18th, 1911, from being elected or being a member of the said urban district council, or any other such council, board, or commissioners.

At the hearing of the complaint it was proved by Richard J. Gill, clerk of the Ballinasloe urban council, that William Hastings was elected as a member of the Ballinasloe board of guardians on the 2nd June, 1914; that he made and signed a declaration accepting office on the 9th June, 1914, and that he acted as a member of the board of guardians at their meeting on the 20th June, 1914. The complainant also proved that William Hastings was, at Ballinasloe petty sessions on February 18th, 1911, convicted of having acted as a member of the urban district council of Ballinasloe when disqualified.

It was contended on the part of the defendant:—1. That in a prosecution under the Local Government Act by an informer against a person for acting after having been disqualified, (*a*) a magistrate could not grant a valid summons, and (*b*) if he granted such, any adjudication thereon would be invalid without the summons having been grounded on the sworn information of the informer. 2. That the offence of "acting" after "having been disqualified" was not a criminal offence, but one governed by Article 11 (4) of the Local Government (Application of Enactments) Order, 1898; that the informer's remedy lay under Article 11 (4); and that the provisions of Article 12 (11) did not apply to the offence charged against the defendant. 3. That, assuming Article 12 (11) did apply to the offence charged in the summons, each conviction had under that article did not impose from the date thereof the seven years' disqualification enacted by sect. 94 (3) of the Local Government Act, 1898. 4. That under sect. 87 of the Municipal Corporations Act, 1882, the election of a person could not be questioned on the ground of his having been disqualified at the time of the election, except by an election petition. 5. The defendant also questioned the legality of his conviction of February 18th, 1911, and of his primary conviction of June 3rd, 1905.

K. B. Div. 1914.

HASTINGS v. O'CARROLL.

The justices held that by reason of the conviction of the 18th February, 1911, the defendant was disqualified for a period of seven years from that date for being elected or being a member of the Ballinasloe urban district council, or any other such council, board, or commissioners. They were of opinion that the evidence brought the case within the operation of, and rendered the defendant legally liable under, sect. 94 (3) of the Local Government (Ireland) Act, 1898, and Article 12 (11) of the Local Government (Application of Enactments Order, 1898, and they accordingly convicted the defendant, ordering him to pay a fine of £3, or in default of payment to be imprisoned for two months.

Bartley for the appellant:—

The principal question is whether the magistrates had jurisdiction to deal with the case summarily under Article 12 (11) of the Local Government (Application of Enactments) Order, 1898. Sect. 104 of the Local Government (Ireland) Act, 1898, empowered the Lord Lieutenant by Order in Council to apply to Ireland certain portions of English and Scotch Acts of Parliament specified in the 4th Schedule to the Act. Section 107 of the Act provides that any Order in Council made under sect. 104, unless annulled in the manner provided by sect. 107, shall be valid, and shall be deemed to have been duly made, and that the validity of the order shall not be objected to in any proceeding. The effect of this section is to give to the Order in Council the force of a statute. Section 94 of the Act creates certain disqualifications. It provides by sub-s. 1 that a person in holy orders, or a regular minister of any religious denomination, shall not be eligible as a county or district councillor. It also provides by sub-s. 3 that any person who is convicted of acting when disqualified, or voting when prohibited, shall be disqualified for a period of seven years for being elected or being a member of the council. The disqualifications created by sect. 94 of the Act do not involve anything criminal or discreditable. Several disqualifications are created by the Application of Enactments Order. These are set forth in Article 12. Nearly all of them involve something criminal or discreditable. Persons who within five years have been sentenced to hard labour, or have become

bankrupt, or have made an arrangement with their creditors; persons who hold any place of profit under the council, or are concerned in any contract with the council—all these are disqualified by the Application of Enactments Order. The disqualifications created by the Application of Enactments Order being very different in character from those created by sect. 94 of the Act, are dealt with in a different manner. The disqualifications created by the Enactments Order are dealt with by sub-s. 11 of Article 12, which is as follows:—"If any person acts when disqualified or votes when prohibited under this Order, he shall for each offence be liable on summary conviction to a fine not exceeding twenty pounds, without prejudice to the disqualification enacted by sub-section three of section ninety-four of the Act."

This sub-section clearly applies only to disqualifications created by the Order, and not to disqualifications created by sect. 94 of the Act. The last clause shows that persons convicted under this sub-section are disqualified for seven years under sect. 94 of the Act, but it does not follow that persons disqualified under sect. 94 are liable to conviction under this sub-section. The punctuation shows that the sub-section applies only to disqualifications created by the Order. If it had been intended to apply the sub-section to disqualifications not created by the Order, there would be a comma after disqualified. The punctuation should be taken into account in construing the sub-section. In the case of an ordinary Act of Parliament the punctuation does not appear on the Parliament Roll: Craie's Statute Law, 2nd edition, page 198, and therefore has no statutory effect; but in this case the document which has statutory effect is the Order in Council; it is punctuated in the *Gazette*, and the punctuation should be considered in construing the Order. So far as voting when prohibited is concerned, the sub-section is clearly confined to prohibitions created by the Order; and in the case of disqualifications there is no reason why the sub-section should be extended to disqualifications other than those created by the Order. Mr. Hastings may possibly be liable under Article 11, sub-s. 4, to a fine of £50, to be recovered by action, but he is

K. B. Div. 1914.

HASTINGS v. O'CARROLL.

clearly not liable to summary conviction under Article 12, sub-s. 11.

[KENNY J.: In the case of *The King* (*Hastings*) v. *The Justices of Galway* (1) (decided in this Court on May 11th, 1911), we held that Article 12 (11) includes the disqualification mentioned in sect. 94 (3) of the Local Government (Ireland) Act.]

M'Cormack, for the respondent, was not called on.

CHERRY L.C.J.:—

We all agree that we are bound by the decision of this Court in the case of *The King* (*Hastings*) v. *The Justices of Galway* (1), in which the facts were almost identical with those now proved. We accordingly affirm the conviction.

GIBSON and KENNY JJ. concurred.

Solicitor for the appellant: *M. L. Colahan*.
Solicitors for the respondent: *Golding & Shiel*.

C. L.

---

(1) NOTE.

KING'S BENCH DIVISION, MAY 11, 1911.

Before PALLES C.B., KENNY and WRIGHT JJ.

THE KING (HASTINGS) *v.* THE JUSTICES OF GALWAY.

In this case an application was, by leave of the Court, made on behalf of the prosecutor calling upon the justices to show cause why a writ of certiorari directed to them should not issue requiring them to remove into the King's Bench Division for the purpose of being quashed certain orders made by the justices sitting at Ballinasloe petty sessions on the 18th February, 1911, and the 8th April, 1911, on the complaint of Frank Clarke, convicting the prosecutor of acting as a member of the Ballinasloe urban district council when disqualified. From the affidavit of the prosecutor in support of the application, it appeared that the disqualification alleged at the prosecution of February 18th, 1911, was that on June 3rd, 1905, he had been convicted of acting as a member of the Ballinasloe urban district council when disqualified, and was by that conviction disqualified for seven years from the date thereof. On the

8th April, 1911, the justices convicted him of acting as a member of the urban council, on the 6th February, 1911, when disqualified, the disqualification being the same as in the previous case. In these cases the justices purported to act under the Local Government (Application of Enactments) Order, 1898, Article 12 (11). It was contended at petty sessions, on behalf of the prosecutor, that the justices had no jurisdiction to hear the cases under Article 12 (11). In an affidavit made by Francis Clarke, it was stated that the prosecutor appealed from the order made by the justices on the 13th February, to the Recorder of Galway, and that on the 28th March, 1911, the Recorder confirmed the conviction. Notwithstanding that confirmation, the prosecutor acted on April 3rd as a member of the urban council. For that offence he was convicted on April 8th.

Bartley for the prosecutor.

Longworth for Francis Clarke.

The Court ordered that the prosecutor's application for a conditional order for a writ of certiorari be refused.

C. L.

IN THE GOODS OF CARLETON.

Will—Mistake—Codicil referring to earlier instead of later Will—Revival.

A testator made a will, and afterwards made another which contained the usual clause revoking all prior wills or testamentary dispositions. Subsequently he duly executed a codicil, which, by mistake, was endorsed on and referred to the earlier will:—

Held, that all three documents must be admitted to probate.

In the Goods of Stedham, 6 P. D. 205, followed.

The testator, Christopher Carleton, died on the 7th September, 1914. On the 17th September, 1910, he had executed a will whereby (among other bequests) he bequeathed to his son Christopher the sum of £150, and devised and bequeathed his lands of Littlerath and Kilcooley to his daughter, Mrs. Jane Niblock, with certain contingent trusts over to her child or children, and appointed her his residuary legatee. Mrs. Jane Niblock and testator's son, David E. Carleton, were appointed executors and trustees of the will. By a codicil, dated the 8th April, 1911, the testator bequeathed to his son Christopher a further sum of

K. B. Div. Probate. 1914.

IN THE GOODS OF CARLETON.

£100 (making £250 in all), but did not otherwise alter his will. On the 22nd July, 1911, the testator executed a new will, revoking and annulling "all other will or wills or other testamentary dispositions by me at any time heretofore made," by which he devised and bequeathed his lands of Littlerath and Kilcooley to his grandson, John Niblock (son of Jane Niblock), and named his daughter Mary as one of his residuary legatees. With the exception of these alterations, the will of the 22nd July, 1911, embodied all the provisions of the will of the 17th September, 1910, and codicil of the 8th April, 1911, *inter alia* directing his executors "to pay the sum of £250 which I hereby bequeath to my son Christopher." On the 22nd July, 1911, and 25th January, 1913, the testator executed two codicils to this will, dealing only with the disposal of his farming stock.

Both wills were engrossed in the same hand, and were kept by the testator's solicitor. On the 15th November, 1913, the solicitor attended the testator at his residence for the purpose of drawing a further codicil to his will. By mistake he took with him the will of the 17th September, 1910, on which the codicil was endorsed, commencing as follows:—"I, Christopher Carleton, do make this second codicil to my foregoing will. As regards the legacies of £150 and £100 left by my will and first codicil to my son Christopher. . . ." The codicil dealt only with the bequest to the testator's son Christopher, and concluded: "In all other respects I confirm my said will and codicil."

The codicil was duly executed and attested, and the mistake was not discovered until after the testator's death.

Carrigan K.C., for the executors, moved for a grant of probate of the will of 22nd July, 1911, and codicils of 22nd July, 1911, 25th January, 1913, and 15th November, 1913. He referred to Miller's Probate Practice (2nd ed.), p. 222; *Rogers* v. *Pittis* (1). In *In the Goods of Stedham* (2), and *In the Goods of Dyke* (3), where a similar mistake arose, the Court granted probate of all the instruments. We have ascertained that in *Stedham's Case* (2)

(1) 1 Add 30.
(2) 6 P. D. 205.
(3) 6 P. D. 207.

the earlier will did not contain any clause of revocation, but that both wills in *Dyke's Case* (1) contained the usual clause.

MADDEN J.:—

I think the proper thing to be done is to admit all three documents to probate, leaving it to a Court of construction to interpret them; by so doing, I am acting in accordance with the decision in *In the goods of Stedham* (2).

Solicitors for the executors: *John Clark & Co.*

A. H. W.

HELENA PERRY AND OTHERS *v.* JOHN FITZGERALD AND OTHERS (3).

Practice—Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78)—*Leave to issue Execution—Ejectment for Non-payment of Rent.*

An action of ejectment for non-payment of rent comes within s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914.

SUMMONS.

This was an application on behalf of the plaintiffs, under the Courts (Emergency Powers) Act, 1914, for an order that, notwithstanding the provisions of sec. 1, sub-sec. 1 (*a*), of that Act, the plaintiffs might be at liberty to exercise the following remedy for enforcing the payment or recovery of money, that is to say, to issue and duly execute a writ of possession pursuant to the judgment for possession entered in the action on the 30th day of October, 1914.

The writ in the action claimed possession of certain premises held by the defendant as yearly tenant to the plaintiffs, at the yearly rent of £18, payable half-yearly on the 25th March and the 29th September in every year, the sum of £36, two years' arrears of rent due to the 25th March, 1914, being due and owing by the defendant to the plaintiffs in respect of the

(1) 6 P. D. 207. (2) 6 P. D. 205.

(3) Before MADDEN and BOYD JJ.

K. B. Div. 1914.

PERRY v. FITZGERALD.

premises. The writ also claimed judgment for the said sum of £36.

On the 11th August, 1914, Sir Augustine Baker, the general solicitor for minors and lunatics, was appointed guardian *ad litem* of the defendant, John FitzGerald, who was of unsound mind. The defendant, John FitzGerald, thereupon appeared by his said guardian *ad litem*. No defence having been entered to the writ of summons, judgment was marked on the 30th October, 1914, in the following terms: "That the plaintiffs recover possession of the land in the indorsement of the writ described as" [the description was set out]. The present application was not opposed by the guardian *ad litem* of the defendant.

M. G. Longfield for the plaintiffs:—

It is considered that the present application is necessary, inasmuch as the statutory ejectment for non-payment of rent in Ireland, under the Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 52, may be held a proceeding for the payment or recovery of a sum of money, within the meaning of sect. 1, sub-s. 1 (*a*), of the Courts (Emergency Powers) Act, 1914. The latter statute, in sect. 1, sub-ss. 1 and 7, defines the cases to which it applies by reference to certain specified exceptions, namely, contracts entered into after the 4th day of August (save certain contracts of tenancy), and contracts with alien enemies, as well as by including certain doubtful cases, namely, claims under certain small policies, and proceedings under the Small Tenements Recovery Act, 1838. In *Durell* v. *Gread* (1) the clause of re-entry in a lease was held to create merely an ancillary remedy for the rent, and the action for rent and possession which had been instituted while the proclamation of the 6th August, 1914, under the Postponement of Payments Act, 1914, was in force, was accordingly dismissed.

[Madden J.:—The ejectment based on a clause of re-entry is an ejectment on the title.]

The proceeding in Ireland, although purely statutory, originated in the conditions of re-entry or forfeiture usually

(1) 31 T. L. R. 22.

inserted in leases, and is "potentially" an action for the recovery of the rent: *per* Fitzgerald J., *Russell* v. *Moore* (1).

The onus is, however, on the defendant to show that his inability to pay the rent is due to the war, and this has not been shown in the present case.

There was no appearance for the defendants.

MADDEN J.:—

We are of opinion that an action of ejectment for non-payment of rent comes within sect. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914. In England there is no statutory proceeding by ejectment founded on non-payment of rent. There, the lessor's remedy is by ejectment on the title, where the condition as to payment of rent has been broken. In *Durell* v. *Gread* (2) it was held in England by Scrutton J., that such an action came within words in the Moratorium Proclamations similar to those in the Courts (Emergency Powers) Act. The Irish action of ejectment for non-payment of rent is more clearly an action for the recovery of rent. It is founded on the rent being in arrear for a defined period, and the whole procedure, including the provisions as to redemption, points at the recovery of rent. The position is clearly stated in the judgment of Lord FitzGerald (then FitzGerald J.) in *Russell* v. *Moore* (1):—"The action is one potentially to enforce the payment of rent, and in default of payment to recover possession of the land. The landlord does not recover by 'title,' but because a year's rent is due and unpaid." Adopting the language of Lord FitzGerald, and applying it to the present case, I hold that this case comes within the Act.

The summons has been duly served; there is no appearance on behalf of the defendant. He is a lunatic, and has the protection of the general solicitor for minors and lunatics, who has been appointed to represent him. It is clear that he has no claim to relief under the Act.

BOYD J. concurred.

Solicitors for the plaintiffs: *O'Connor & Dudley.*

(1) 8 L. R. Ir. 318, at p. 330. (2) 31 T. L. R. 22.

A. E. C.

Appeal. 1913.
Nov. 25, 26, 27.

NAAS URBAN DISTRICT COUNCIL AND EDWARD MARUM *v.* THE GREAT SOUTHERN AND WESTERN RAILWAY COMPANY (1).

Rates—Local Government—Town Rate—Validity—Rate signed by Six Members of Urban Council—Sufficiency, without further Operation of making up and signing of Book of Assessment as provided by s. 61 of the Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103)—Repeal of that Section—Power to amend Rate notwithstanding Payment—Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 172, 174—Public Bodies Order, 1904, Art. 72.

Where an Urban District Council makes a town rate in the form prescribed by Article 72 of the Public Bodies Order, 1904, such rate being signed in the rate-book by six members of the council, the rate is valid, and the further operation of making up a book of assessment to be signed by the chairman and two members, as formerly provided by section 61 of the Towns Improvement (Ireland) Act, 1854, is not necessary for the validity of the rate. That section has been entirely repealed by subsequent legislation.

R. (*M'Kenna*) v. *Urban District Council of Monaghan*, 38 I.L.T.R. 18, considered.

The power of amendment of a rate conferred upon the rating authority by section 174 of the Towns Improvement Clauses Act, 1847, may be exercised notwithstanding that the amount of the original rate has already been demanded from, and paid by, the person liable thereto.

APPEAL from an order of the King's Bench Division, dated the 17th June, 1913, directing a new trial of the action.

The action was brought by the plaintiffs to recover from the defendants, as occupiers of rateable premises within the boundaries of the town of Naas, the balance of consolidated urban district rates, for the service of the years ending the 31st March, 1911, 1912, and 1913, respectively. The amounts of three town rates were in dispute in the action—the sum of £11 12*s.* 4*d.* in respect of the year ending the 31st March, 1911; the sum of £21 9*s.* in respect of the year ending 31st March, 1912; and the sum of £19 2*s.* 3*d.*

(1) Before O'BRIEN L.C. and HOLMES and CHERRY L.JJ.

in respect of the year ending the 31st March, 1913. The valuation lists sent forward by the commissioner of valuation on which the rates struck by the urban council for the year 1910–1911 were assessed, contained a sum of £190, representing the value of certain premises of the defendants described as "Naas Station House, Station Master's House, and Goods Store," and the council struck a rate on this sum of £190, without making any exemption in respect of "lands used as a railway," under sect. 62 of the Towns Improvement (Ireland) Act, 1854. On the 15th October, 1910, the secretary of the defendant company wrote to the clerk of the council demanding that such exemption should be allowed in respect of portion of the premises comprised in the £190 valuation; and a lengthy correspondence ensued, in the course of which the defendants insisted upon their right of exemption, while the council maintained that it was their duty to strike the rate on the lists sent forward by the commissioner of valuation as they stood.

On the 28th December, 1910, the defendants paid the full amount of the rates then due, "without prejudice to our right to demand refund of any over-payment made therein, and deduct same from next account"; and on the 25th February, 1911, their secretary wrote the following letter to the council:—"Referring to mine of 15th October, 1910, as to the rates assessed on the company's premises, and pointing out that the commissioner of valuation, if applied to, would issue a certificate showing the proper division of the company's property for rating purposes, I now enclose a copy of such certificate, issued by the commissioner of valuation, which you can also procure if you have not already received it; and I beg to point out that the certificate shows the portion of the company's property liable to full rates, as also the respective portions which are liable only to quarter rates under the provisions of the Public Health Act, 1878, and Towns Improvement Act, 1854. All future rates will be paid by the company in accordance with the figures as set out in enclosed copy of certificate, and when paying the rates for the present year the company will deduct the amount which was paid in excess and without prejudice in last year's rates in respect of the portion of the property as shown on the commissioner's certificate for which quarter rates are only properly payable."

Appeal. 1913.

NAAS URBAN DISTRICT COUNCIL v. GREAT SOUTHERN AND WESTERN RAILWAY CO.

The enclosed document from the commissioner of valuation was in the following form:—

GREAT SOUTHERN AND WESTERN RAILWAY.

Apportionment of the rateable valuation of Naas Station in accordance with the judgment of the Queen's Bench in the cases of the *London and North Western Railway* v. *Llandudno Improvement Commissioners* and *Williams* v. *The London and North Western Railway Co.*

The following items are liable to full rates:—Passenger station house, station master's house, platform sheds, goods store, tank houses, entire buildings and foot-bridges, £47.

The following items are liable to one-fourth rates:—Engine shed, platform and platform roof, signal cabins, turntable, approaches and sidings, £143.

ALFRED BECKETT,

For the Commissioner of Valuation.

As the urban council believed this document to be binding on them, the clerk of the council on the 26th August, 1911, forwarded to the railway company a paying order for £11 12*s.* 4*d.*, being the amount which would have represented the overpayment by the railway company in respect of the second moiety of the rates for the year 1910-1911, if in fact they were entitled to the exemption claimed; and the rates struck by the council for the years 1911-12, and 1912-13, were subsequently made on the basis of the company being entitled to such exemption. Rate-books were prepared by the clerk of the urban council in conformity with the 72nd Article of the Public Bodies Order, 1904, and s. 172 of the Towns Improvement Clauses Act, 1847 (1), and the allowance of the town rates

(1) Public Bodies Order, 1904, Art. 72:—"Immediately on receiving from the commissioner of valuation the revised list of tenements and hereditaments, the secretary of the county council or the clerk of the urban district council, as the case may be, shall prepare therefrom in duplicate the poor-rate books (forms 47, 48), including all particulars required for such rate-books, and shall therein assess the several rates determined by the

in question in this action was signed by six members of the council, of whom one was in fact the chairman. There was, however, no independent book of assessment signed by the chairman of the day and two other members of the council, as provided for by section 61 of the Towns Improvement (Ireland) Act, 1854 (1).

On the 24th October, 1912, the clerk of the council wrote to the secretary of the defendant company, pointing out that the company was not in law entitled to the refund of the sum of £11 12*s.* 4*d.*, which had been made, and applying for the repayment of this sum; but this request was refused.

On the 31st December, 1912, the urban council passed the following two resolutions, purporting to exercise the power of

council upon the persons liable in respect of the several tenements and hereditaments, and otherwise in accordance with the provisions of the statutes relating to the same, and the rate books shall be completed and ready for signature in sufficient time to enable the rate to be made not later than one month after the beginning of the period for the service of which it is made."

Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 172:—"Every such rate shall be fairly transcribed in a book to be kept for that purpose, and may be in the form given in the Schedule (A) annexed to this Act, or as near thereto as the circumstances of the case will admit of, and every such rate shall contain an account of every particular set forth at the head of the respective columns so far as the same can be ascertained, and every such rate shall be signed by not less than six of the commissioners."

(1) Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), s. 61: "The clerk of the union shall, on the requisition of the commissioners, produce the rate-book of the union, and the said commissioners shall annually cause to be made up a book of assessment, to be signed by the chairman and two others of the commissioners, showing the net annual value of the whole premises in the town under the poor law valuation liable to be assessed under this Act, and according to which the assessments under this Act are intended to be levied; and such book of assessment shall be open to inspection by all ratepayers, in the hands of the clerk; and the commissioners shall have power to rectify any mistake or error, upon the ground of any variance from the last assessment for poor rates; and in each year a copy of the said book of assessment, as finally adjusted by the commissioners, signed by the chairman and two commissioners, and countersigned by the clerk, shall be delivered over to the collector, as the rule for levying and collecting the annual assessment under this Act, and shall be deemed to be evidence of each and every separate assessment for the purposes of this Act."

Appeal. 1913. NAAS URBAN DISTRICT COUNCIL *v.* GREAT SOUTHERN AND WESTERN RAILWAY CO.

amendment given by sect. 174 of the Towns Improvement Clauses Act, 1847 (1), notwithstanding that the amount of the rates in question, as originally assessed, had already been paid by the company:—

"That it appearing to the council that the Great Southern and Western Ry. Co. were under-rated in respect of rating No. 198, in the rate made for the year ending 31st March, 1912, inasmuch as the said railway company were assessed in one-fourth of the valuation only on the sum of £143, part of their valuation of £190, whereas they should have been assessed in the full rate on the said valuation of £190 (including said sum of £143): Resolved that the said rate be amended by assessing the company at the full rate on the said sum of £143, thereby increasing their assessment in respect of said No. 198, from £40 6*s.* to £61 15*s.*

"Dated 31st day of December, 1912."

"That it appearing to the council that the Great Southern and Western Railway Company were under-rated in respect of rating No. 202 in the rate made for the year ending 31st March, 1913, inasmuch as the said railway company were assessed in one-fourth of the valuation only on the sum of £143, part of their valuation of £190, whereas they should have been assessed in the full rate on the said valuation of £190 (including the said sum of £143): Resolved that the said rate be amended by assessing the company at the full rate on the said sum of £143, thereby increasing their assessment in respect of said No. 202 from £41 13*s.* 6*d.*, to £66 2*s.* 1*d.*

"Dated 31st day of December, 1912."

Notice of these amendments was duly served on the defendants, but no appeal was taken by them against the rates so amended.

(1) Towns Improvement Clauses Act, 1847, s. 174: "The commissioners may from time to time amend any rate made by virtue of this or the special Act . . . . by raising or reducing the sum at which any person has been rated, if it appear to them that such person has been under-rated or over-rated, or by making such other amendments therein as will make such rate conformable to this and the special Act, and no such amendment shall be held to avoid the rate."

The defendants having refused to pay back the sum of £11 12*s.* 4*d.* which had been refunded to them, and having also refused to pay the difference between the amounts of the rates paid by them for the years 1911–1912, and 1912–13, and the amounts of the amended rates, the present action was instituted by the plaintiffs. On the trial of the action before Dodd J., a controversy arose as to the state of the valuation lists sent forward by the commissioner of valuation on which the rates for the year 1912–1913 were struck; the defendants contending that the valuation lists had been altered by the commissioner of valuation in conformity with the above-mentioned certificate, so as to show the proper exemption in respect of the company's buildings used as railways, while the clerk of the council swore that no alteration had been made, which evidence the learned judge at the trial accepted, and he entered judgment for the plaintiffs for the full amount claimed. The defendants having applied to the King's Bench Division to set aside the judgment so entered for the plaintiffs, and for a new trial of the action, the Court directed a new trial to be had so as to enable further evidence to be produced on the question of the form of the valuation lists sent forward to the urban council, but the Court expressed no opinion on the legal question involved. The plaintiffs appealed.

Henry K.C., *Jellett K.C.*, and *Murnaghan*, for the appellants:—

[They contended that a new trial should not have been granted for the production of fresh evidence.]

The judgment entered for the plaintiffs at the trial should stand. They are entitled to a return of the sum of £11 12*s.* 4*d.* That sum was refunded by the urban council to the defendants in the belief that the document forwarded by the defendants to the council on the 28th December, 1910, was, in fact, a "certificate" from the commissioner of valuation which effected a change in the valuation list forwarded by him, as had been represented by the defendants. It was, in fact, not a "certificate," but a memorandum, which had no legal effect whatsoever, and accordingly the original rate assessed on the defendants on the sum of £190, without any exemption, and paid by the defendants, was

Appeal. 1913.

NAAS URBAN DISTRICT COUNCIL v. GREAT SOUTHERN AND WESTERN RAILWAY CO.

the correct rate. This was money paid by the council under a mistake of fact, brought about by the representation of the defendants that the document they sent was a certificate binding on the council, and the latter are not precluded from recovering it. It was a public debt which they had no power to remit: *The Queen* v. *Blenkinsop* (1); *Skyring* v. *Greenwood* (2); *Eaglesfield* v. *Londonderry* (3).

As to the sum claimed in respect of the year 1911–1912, we contend, first, that the council was empowered under section 174 of the Towns Improvement Clauses Act, 1847, to amend the rates assessed on the defendants for that year; and, secondly, that as the defendants did not appeal against the amended rate, they are bound by it, and cannot raise the question of the validity of the amendment in this action: *Whaley* v. *Great Northern Railway Company* (4). Section 174 expressly contemplates the case of the owner of rateable hereditaments being "under-rated," which was the case here, and that such rate should be amended. The fact that the lower rate was demanded and paid does not affect the power of amendment: *The King* (*Scottish Prov. Inst.*) v. *Recorder and Lord Mayor, etc., of Belfast* (5); *Mayor, Aldermen, and Councillors of the City of Westminster* v. *Edgcome* (6).

The same principles apply to the sum claimed in respect of the year 1912–1913, once the disputed question of fact as to the condition of the valuation lists when they were sent forward to the commissioner of valuation is determined in our favour, as it was by the judge at the trial.

Gerald FitzGibbon K.C., and *Phelps*, for the respondents:—

The sum of £11 12*s.* 4*d.* was refunded by the urban council to the defendants under a mistake of law, namely, a mistake as to the binding effect of the document obtained from the commissioner of valuation. It was also paid as the result of a compromise of a bona fide dispute, and is therefore irrecoverable: *Bath's Case* (7).

(1) [1892] 1 Q. B. 43.
(2) 4 B. & C. 281.
(3) 4 Ch. D. 693.
(4) [1913] 2 I. R. 142, 171.
(5) [1904] 2 I. R. 374.
(6) 67 J. P. 25.
(7) 8 Ch. D. 334.

As to the remaining sums claimed, we admit that, having regard to the decision in *Whaley* v. *Great Northern Railway Co.* (1), the defendants are bound by the amended rates, if valid, they not having appealed against them. We submit, however, that the two amended rates were invalid for two reasons. The amendments themselves were invalid, having regard to the time the resolutions of the 31st December, 1912, were passed. Prior to that, the original rates had been demanded and actually paid by the defendants. A reasonable construction must be put upon sect. 174 of the Towns Improvement Clauses Act, 1847, and it would be wholly unreasonable to allow a council to go through their rate-books during an unlimited time, and re-open rates which had been actually demanded and paid. Once payment has been made, we submit the power of amendment is gone. Further, the power of amendment is given for the purpose of making the rate "comformable" to that, or the special Act; here the amended rates would result, not in conformity, but in a surplus in the council's hands.

We further contend that the rates in question were wholly invalid, inasmuch as the provisions of sect. 61 of the Towns Improvement (Ireland) Act, 1854, have not been complied with. No "book of assessment" was drawn up, "signed by the chairman and two others of the commissioners," as required by that section; that operation was essential for the making of a valid rate, in addition to the signing of the rate by six of the commissioners under sect. 172 of the Towns Improvement Clauses Act, 1847. This is the result of the decision of this Court in *R.* (*M'Kenna*) v. *Urban District Council* of *Monaghan* (2), where FitzGibbon L.J. laid down that the provisions of the Local Government (Ireland) Act, 1901, "will not relieve the body of two operations, one by six commissioners, and one by the chairman and two commissioners. Two operations are necessary, the making of the assessment, and the making of the rate." Here the former operation is wanting.

Henry K.C., in reply:—

In *M'Kenna's Case* (2) the rate was wholly bad, owing to the absence of the signatures of six members of the council. Here, if

(1) [1913] 2 I. R. 142, 171. (2) 38 I. L. T. R. 18.

Appeal. 1913. NAAS URBAN DISTRICT COUNCIL *v.* GREAT SOUTHERN AND WESTERN RAILWAY CO.

the 61st section of the Towns (Improvement) Ireland Act, 1854, is still in force, it has been substantially complied with. The rates struck by the council are in the form prescribed by Article 72 of the Public Bodies Order, 1904; these forms contain all the particulars required by statute, and the signatures of the six members attached to the forms include those of two members and the chairman. Sect. 61 has, however, been at least impliedly repealed by the later legislation, and is no longer in force. See Adaptation of Irish Enactments Order, 1899, Part II, section 19, and section 4 of the Local Government (Ireland) Act, 1901.

O'BRIEN L.C.:—

This case was exhaustively argued; the facts have been brought so efficiently before our minds, and every detail of the law has been so carefully dealt with, that it does not seem to me necessary to reserve judgment. I do not say that the case is not one of great weight and importance; but in the circumstances under which it was argued, the facts and the law are so clearly present to my mind at the moment that I do not think anything could be gained by reserving judgment.

The action, which was tried before Mr. Justice Dodd without a jury, was brought to recover three sums of money which (subject to certain adjustments I need not now refer to) are alleged to be due in respect of town rates struck to meet expenditure of the Naas urban district council, viz., £11 12*s.* 4*d.*, for rates in respect of the year 1910–1911, £190 in respect of the year 1911–1912, and £78 11*s.* 7d. in respect of the year 1912–1913. It is not necessary to go into the figures showing the reduction of these sums by what has been lodged it Court; it will be enough to deal with the principles of law applicable to the alleged right to recover these three sums.

Now, the form in which the town rate was dealt with by the urban council in the present case is as follows:—They had a book, which is a rate-book, and which, for the reasons I will mention later on, contains everything that is essential for the making of the town rate. They prepared this rate-book, as it was their duty to do, for the purpose of striking the poor rate and town rate. Prior to the Local Government Act of 1898 this

council had, of course, no power in a direct way to strike a poor rate. Now they are the authority which strikes the poor rate on information supplied to them by the commissioner of valuation, and at an early date the question arose whether or not the poor rate and the town rate could be dealt with, for the purposes of convenience and the saving of expense, in the same set of books. It appears that to enable this to be done the Local Government Board, under their statutory powers, prescribed certain forms, and it is admitted that the form which was used in connexion with the three rates now in question is that prescribed by the Local Government Board.

Now, the first question—and it is one of considerable importance, because it not only affects this case but may affect every rate in Ireland—is whether this method conformed with what was prescribed by the 61st section of the Towns Improvement (Ireland) Act, 1854:—"The clerk of the union shall, on the requisition of the commissioners, produce the rate-book of the union, and the said commissioners shall annually cause to be made up a book of assessment, to be signed by the chairman and two others of the commissioners, showing the net annual value of the total premises in the town under the poor law valuation liable to be assessed under this Act, and according to which the assessments under this Act are intended to be levied, and such book of assessment shall be open to inspection by all ratepayers, in the hands of the clerk, and the commissioners shall have power to rectify any mistake or error." That dealt with the method of bringing into existence an assessment, under which a liability upon the ratepayers of the town to pay rates would follow.

In the case of *R.* (*M'Kenna*) v. *Urban District Council of Monaghan* (1) the question was argued whether or not that 61st section, coupled with the provisions of the Local Government Act, regulated the method of assessing rateable tenements, and it was held by this Court, and accordingly is now the law, that, notwithstanding sect. 61, sect. 172 of the Towns Improvement Clauses Act, 1847, was in force, and should be complied with. That section is as follows:—"Every such rate shall be fairly

(1) 38 I. L. T. R. 18.

Appeal. 1913. NAAS URBAN DISTRICT COUNCIL *v.* GREAT SOUTHERN AND WESTERN RAILWAY CO. O'Brien L.C.

transcribed in a book to be kept for that purpose, and may be in the form given in the Schedule (A) annexed to this Act, or as near thereto as the circumstances of the case will admit of, and every such rate shall contain an account of every particular set forth at the head of the respective columns so far as the same can be ascertained, and every such rate shall be signed by not less than six of the commissioners."

M'Kenna's Case (1) determined, as I have said, that in respect of town rates struck by bodies such as the Naas urban district council the provisions of that Act must be complied with. For the purposes of that decision one question only was material, namely, whether or not the provisions of the Act which I have referred to should be complied with. There is no doubt that in the course of the case expressions of opinion were given by FitzGibbon L.J., and only by him I think, which, if taken literally, and if binding on this Court now, would imply that the provisions of sect. 61 of the Towns Improvement (Ireland) Act, 1854, and those of sect. 172 of the Act of 1847, dealt with two different subject-matters; that there should be two different and independent operations, and that, accordingly, in the present case, as was contended by the Railway Company, there should have been two separate operations evidenced by distinct books, one under sect. 61 of the Act of 1854, signed by the chairman and two members of the council, and the other under sect. 172 of the Act of 1847, signed by six members. Mr. FitzGibbon has argued here that *M'Kenna's Case* (1) determined that proposition of law, and that as we have here only one operation on the face of this book, namely, a procedure under the Act of 1847, the rate is accordingly bad.

Now, in *M'Kenna's Case* (1) the matter was dealt with by the other two judges of the Court on the ground which as it seems to me—and I was counsel in the case and have a distinct recollection of it—was the real ground at issue; they dealt solely with the provision in the Act of 1847 making it necessary to have the signature of six commissioners. It has been determined, as I understand the decision, that it is quite lawful to amalgamate

(1) 38 I. L. T. R. 18.

the two procedures; and certainly if section 61 is still in force, and if I were pressed so to decide, it would appear to me to be a matter of common sense to hold that there has been in the present case a substantial compliance with section 61, because, looking at the book, I find that it is signed by three people, and it is not suggested that one of them was not chairman, and the others two members of the council. But it is said that that is not enough, that this document is in some mysterious way deficient; it does not satisfy the requirements of making a legal assessment, and thus, applying the principle of *M'Kenna's Case* (1), it is not sufficient for the plaintiffs' case. Accordingly we have to consider this matter of assessment and rating, and, speaking for myself, I consider that it is very difficult to find any essential difference between a book of assessment complying with the provisions of section 61 of the Act of 1854, if in force, and a rate-book brought into existence under section 172 of the Act of 1847 *plus* the special provisions of the Local Government Act of 1898 and that of 1901. I cannot see that there is anything wanting in this book which would be required to conform with the provisions of the first part of section 61.

I think it desirable, however, to base my judgment on a broader view. I think what I have said is sufficient to show that on the face of this book there is a sufficient compliance with section 61, if in force; but at the same time I fail to see how any part of that section can be regarded as remaining as an effective enactment on the statute book. The second part of the section, beginning with the words "and the commissioners," &c., is unquestionably repealed; and all that could be considered as left would be the earlier provisions, which at the present time would be purely declarative, namely, that the clerk should produce the rate-book of the union, and that the commissioners should annually "cause to be made up a book of assessment, to be signed by the chairman and two others of the commissioners, showing the net annual value" of the rateable premises.

Now, in the first place, the Act of 1898 contemplates that the clerk of the county council should be substituted for the clerk of the union, and that some book, referred to as a rate-book, should

(1) 38 I. L. T. R. 18.

Appeal.
1913.

NAAS URBAN DISTRICT COUNCIL *v.* GREAT SOUTHERN AND WESTERN RAILWAY CO.

O'Brien L.C.

be forwarded by another official than the clerk of the union. At the present time it appears from clause 19 of Part II of the Adaptation of Enactments Order of 30th January, 1899, that the rate-book is not now in the custody of the clerk of the union at all; it is not sent forward by him at all; the thing on which the rate is made, and the only thing on which it can be made, is the document containing the copy of the valuation which the commissioner of valuation sends forward, not to the clerk of the county council, but to the clerk of the urban district council, who is bound on this document to strike the rate.

Even if by some process this second book could be brought into existence, annually made up and signed, it would be useless for any purpose. The rate-book brought into existence under the Adaptation of Enactments Order of 1899 and the Act of 1901, is complete in itself; every ratepayer after inspection of it can make up his mind whether or not to appeal from the rate struck on him. The assessment book, even if it could be prepared and signed, would not be effective for any purpose that I can see. There is machinery complete in every detail in existence by which the rate-book signed by the six members is prepared and lies in the office of the council. It forms the basis of the rate; an appeal lies from the rate as shown in it; the ratepayers' interests are fully protected; and in these circumstances I cannot see how the first part of section 61 of the Act of 1854 remains in force at all. I am of opinion that it has ceased to be operative, and this is obviously what was in the minds of those who prepared this rate-book. Their duty was to prepare the rate-book, not to attempt to comply with the first part of section 61.

That disposes of the first broad question dealt with here. It is one of serious importance, having regard to the fact that a contrary decision would probably render every rate struck in Ireland by the local district councils absolutely bad. Of course this Court would not hesitate to hold a rate bad if it was so in fact, notwithstanding what the consequences of such a decision might be, but before doing so it would look most carefully to see whether or not it was coerced so to decide.

I now come to the second sum claimed, that of £11 12*s.* 4*d.*, which is an unimportant item in the case, and need only be referred

to because consideration of it is of assistance on the question that occurs now with regard to subsequent rates.

Now, in the copies of the valuation lists sent forward in respect of which the rates for the year 1910–1911 were struck, there appears in the column of "buildings, &c.," a sum of £190, representing the valuation of certain premises belonging to the Great Southern and Western Railway Company, which were described in the first column. So far as the jurisdiction of the urban council was concerned the case, so far, was perfectly clear, nor was there any argument based on this entry. The duty of the urban council was to strike a rate on the amount of the valuation sent forward, not making any allowance in respect of "railways"; and accordingly they did so. Then comes a matter which is really, to some extent, a question of fact. It appears that in the condition of the law, as understood then, the commissioner of valuation was in the habit of issuing documents, one of which we have here, signed formally at the end, and stating certain facts with reference to property exempt from three-fourths of the tax by reason of being technically "railways."

One of these documents was prepared by the commissioner of valuation, and was brought by the secretary of the railway company to the notice of the Naas urban district council. This document, which had no legal foundation whatsoever, did show that the sum of £190 placed on buildings, which appeared in the rate-book, could not be found fault with on the question of value, but that portion of the buildings being technically "railways," should only be taxed in respect of one-fourth of their value. So far as the rate-book was concerned, the rate was perfectly valid and regular, but the town clerk, being of opinion that there had been in fact a mistake with regard to exemption, brought the matter before the urban council; there was some slight doubt as to what ought to be done, but ultimately the urban council, under a mistake as to the law which regulated their powers and position, refunded this sum of £11 12*s.* 4*d.* to the Great Southern and Western Railway Company. As to this I do not think there is a shadow of doubt; it was clearly money paid under a mistake of law. The urban council made a mistake as to their legal

Appeal. 1913.

NAAS URBAN DISTRICT COUNCIL v. GREAT SOUTHERN AND WESTERN RAILWAY CO.

O'Brien L.C.

position, and that mistake was not brought about by any fraud or extortion on the part of the railway company. That is enough; but, in addition, what occurred was in effect a compromise between the parties, and this would prevent its recovery. The only materiality of this matter is as introductory to what took place when the next rate came to be struck, namely, that for the year 1911–12.

The copies of the valuation lists which were sent to the council, and on which they based that rate, also contained the statement that there was a sum of £190 placed on buildings, and there was no differentiation with regard to what might be rated as "railway"; but the clerk representing the urban council, or whoever prepared the rate-book, being still under the impression that the railway company were only rateable upon one-fourth of the value in respect of portion of the premises included in the £190, in fact so prepared the rate-book; accordingly the rate was made, and subsequently paid by the railway company, on the basis of that supposed exemption.

Now, when the rate for the year 1912–13 was being struck, the urban district council had brought to their notice matters which they thought showed they had made a mistake; they considered that as in the book for 1911–12 the rate was based on a valuation showing £190 placed on "buildings," they had been wrong in rating the company only on one-fourth of the valuation of any portion of the premises, and that they should not have departed from the commissioner of valuation's list; accordingly the chairman and five other members, by a resolution of the same date, acting under the powers they conceived they had to amend rates under section 174 of the Towns Improvement Clauses Act of 1847, purported to amend the rate, and the amendment in that case was perfectly simple; they simply sought to tax or assess the railway company on the valuation of £190 placed upon buildings not being "railway," and the difference between the two sums of money, the sum paid and the sum payable under the amended rate, is the amount in dispute in respect of the rate for 1911–12.

It is a curious thing that although there have been many cases as to the powers of amendment of commissioners under the

174th section, this seems to have been the first case in which the taxing authority had assessed a ratepayer in either too small or too large a sum, and sought subsequently by an operation under the 174th section to make the ratepayer either liable for a larger sum, or to reduce the rate so as to entitle the ratepayer to a refund.

It was contended here that inasmuch as the rate for 1911–12 had been paid, though on an erroneous basis, section 174 had no application; that as the company had made payment of the rate actually struck in that year, there could be no amendment of the rate which would impose on them any increased liability.

During the argument of the case my mind has wavered as to this, but after careful consideration of the circumstances under which these sections have been brought into existence, and their object, namely, to bring about equality of payment amongst ratepayers, I am of opinion that there is nothing in section 174 to support the contention that the power of amendment given to the rating authority is at an end once the erroneous rate is paid; nor do I think that the view presented by the railway company, namely, that the object of giving this power of amendment was only to make the rate conformable to the original estimate, is the true one. In my judgment, the words relied on by Mr. FitzGibbon cannot restrict the effect of the plain words of the section, more especially as the section expressly gives to the person whose rate is amended the same right of appeal with regard to the amended rate as he had with regard to the original one. The amended rate was regularly struck and made, and duly brought to the notice of the railway company; it was open to them to have appealed against the amended rate, but they did not do so, and I take it that the effect of the decision of this Court in *Whaley* v. *Great Northern Railway Company* (1) is that when a person who is duly rated fails to avail himself of his appropriate right of appeal, he becomes bound by the rate, and must pay it. I say nothing as to whether that principle would apply to a case where the rate was affected by some illegality going behind the rate; the rate might be a nullity owing to some absolute illegality in the

(1) [1913] 2 I. R. 142, 171.

Appeal. 1913.

NAAS URBAN DISTRICT COUNCIL *v.* GREAT SOUTHERN AND WESTERN RAILWAY CO.

O'Brien L.C.

striking of the rate itself; I express no opinion at present on that question, which may arise for decision hereafter. It is sufficient to say that here there was a regular rate made on the basis of valuation lists regularly forwarded; provision should have been made for the payment of the rate in full, without any deduction in respect of "railways," in the true view of sect. 174. It was open to the urban council to amend the rate in that respect, even though to do so had the effect of placing on the Great Southern and Western Railway Company a liability for an increased sum, and, as there was no appeal taken by the company against the rate which was so amended, the view taken by Mr. Justice Dodd was correct, and must be upheld.

I now come to the third rate, involving a serious question which cannot be answered on the same lines as the first two, and which is rather a question of fact than of law.

As I have said, when the urban council received the copy of the valuation lists for the making of the rate for the year 1911–1912, it contained the sum of £190 placed on buildings, without any reference being made as to "railways," and it was sworn before Mr. Justice Dodd at the trial that when the valuation lists on which the rate for the year 1912-1913 was to be assessed came to the urban council there was no alteration in the lists as regards this sum of £190 placed on buildings *simpliciter*. Now if that were so in fact, the question as to this third rate would be similar to that with regard to the second disputed rate which I have already dealt with. It appears that, as in the previous year, the clerk of the urban council had at first assessed the rate only on one-fourth of the rateable hereditaments, and accordingly by a resolution passed on the same date—although it was a different resolution—as that dealing with the rate for the previous year, the urban council purported to correct their error in respect of the later rate, as they had done in the case of the former; they made an amended rate, and, as I have said, if a disputed question of fact did not arise, the later rate would have been in the same position as the former.

The matter as it came before the Divisional Court was complicated by what on investigation appears to be an abnormal condition of things. It was alleged by the company that

Mr. Justice Dodd ought not to have drawn the inference of fact he did, namely, that the sworn testimony of the clerk of the council was true, because there were certain inconsistencies between the tots of the valuations in the commissioner's book, and by reason of various other matters the details of which I need not go into. The King's Bench Division thought that the law had been in every respect complied with, and that all that was necessary was to send for the book of that year from the commissioner of valuation's office, when one thing or the other would appear on the face of it. That would not, however, settle the question of what was actually sent down to the urban council, but still the Court thought it would help them; they accordingly sent for the book, but there was nothing in it to help the Court. It was ascertained, however, that, merely for the sake of economy, instead of new lists being prepared each year, there was some sort of a juggle with red, green, and magenta inks, a procedure which, unless stopped, will be likely to be productive of difficulties in the future. Now, new evidence cannot be adduced at the hearing of a new trial motion unless certain formalities have been complied with, which were not, apparently, complied with in the present case; but it is not necessary to express any opinion on this point now, as Mr. FitzGibbon has expressly disclaimed his placing any reliance upon this so-called new evidence. Accordingly, we now merely consider the state of affairs shown by the report of Mr. Justice Dodd, and how far this Court ought to interfere with his finding of fact.

If this were an appeal from the Chancery Division, speaking for myself I would not hesitate to hold—applying as I think we must apply certain rules of procedure and common sense—that the evidence in this case was coercive and ought to be acted on. It may be that other evidence might have been produced, but all we can act upon is what was before the Court, and we are to consider what should have been done on that evidence.

Now, the clerk of the council swore positively, and the judge believed him (and I see no reason to differ from his view), that when the valuation lists—or book containing them—were received by him, there was nothing to indicate any alteration in respect of the valuation of £190 containing a differentiation in respect of

Appeal. 1913.

NAAS URBAN DISTRICT COUNCIL v. GREAT SOUTHERN AND WESTERN RAILWAY CO.

O'Brien L.C.

railways. As against that positive statement we are asked to assume that, because the original lists which were retained in the office of the commissioner of valuation contained some markings in coloured inks, the document which was sent to the urban council necessarily had similar alterations in it. I do not think we should. I may here observe that the one man whose evidence would have been worth considering on this point, namely, the official who made the alteration in the office of the commissioner of valuation, if it was made, was not produced at the trial; and if this were an appeal from a judgment of a judge of the Chancery Division, I would have very great hesitation in differing from the judgment given at the hearing, and there are many things which would induce me to agree with it. *A fortiori* if this were the case of a new trial of a jury action, no one could suggest that there was not ample evidence on which the jury might have drawn the inference of fact which was drawn by Mr. Justice Dodd in the present case. I do not think it is necessary to decide the question whether a Divisional Court, or this Court, is in a different position in dealing with the evidence given in a case at the common law side tried by a judge without a jury, from that where the case is tried by a judge and jury; it is enough to say that, looking at the evidence given, as we have the right to look at it, there is nothing, I think, to induce the Court to say that the finding of fact was wrong, or that there should be a new trial.

Once the finding of fact on this question is determined as I consider it may be, the third rate is in exactly the same position as that of 1911–12. I accordingly consider that, subject to adjustments which can easily be made between the parties, the plaintiffs are, save as to the item of £11 12*s.* 4*d.*, entitled to succeed in the present action.

HOLMES L. J.:—

After the full judgment of the Lord Chancellor, I would not feel justified in adding more than a few sentences. The important legal questions discussed before us were argued, I am sure, in the Divisional Court, but in consequence of its order being confined to directing a new trial on an issue of fact, we have not had the advantage of hearing its view of the law.

My reason for differing from the King's Bench Division as to the new trial is that, so far from being dissatisfied with the finding as to fact of Dodd J., I should have come to the same conclusion without hesitation. The question was the state of the valuation when it was sent to the clerk of the council in the years 1911–1912 and 1912–1913. The clerk, speaking of what he actually saw, describes it. He could hardly have forgotten or been mistaken, and he had no reason to misrepresent. As against this, the only evidence given at the trial was a document stated to be a copy of these valuations, made we know not when or by whom; and it is admitted that the further evidence in the Divisional Court added nothing thereto. The mode in which the valuations are made in each year is most unsatisfactory; but this may arise from want of a sufficient staff in the office, for which the commissioner is not responsible. Be that as it may, I cannot reject the testimony of an apparently honest and intelligent witness of what he saw, by reason of arguments founded on documents so prepared. Therefore I hold that the order for a new trial cannot stand.

Turning now to the legal questions, so much of the judgment as directs repayment of a sum voluntarily paid by the plaintiffs to the defendants in the year 1910–1911, cannot be upheld, for two reasons—(1) because the payment was made in mistake of law; and (2) because the correspondence shows that it was made by way of compromise of a larger demand.

Next comes the claim for portions of the rates alleged to be unpaid in the years 1911–1912 and 1912–1913. The defendants give two answers to this demand. The first, on which Mr. Fitz-Gibbon, I think, principally relied, is that the rates for these years were wholly bad, because the urban council did not cause to be made up and signed a book of assessment by the chairman and two other members of the council as provided by the Towns Improvement (Ireland) Act, 1854, sec. 61. In the Towns Improvements Clauses Act, 1847, incorporated with the Act of 1854, the form of rate is prescribed, and it is enacted that every such rate shall be signed by not less than six of the Commissioners. In *R.* (*M'Kenna*) v. *Urban District Council of Monaghan* (1), this Court decided that the last-quoted

(1) 38 I. L. T. R. 18.

Appeal. 1913.

NAAS URBAN DISTRICT COUNCIL *v.* GREAT SOUTHERN AND WESTERN RAILWAY CO.

Holmes L.J.

provision was still in force, and held that when it was not complied with the rate was bad. I made it clear, as appears from our registrar's note, that this was the only point decided by me; and Walker L.J. I think went no further; but FitzGibbon L.J., while agreeing on this matter, expressed the opinion that the provisions of the 61st section of the Act of 1854 must also be observed, and that although both requirements might be contained in one rate-book they must appear separately. In this case, we have what is required to be signed by six commissioners duly signed by six members of the council in the form that has been in use for years, and I have not heard any objection thereto; but it has been argued on the strength of the dictum of FitzGibbon L.J. that the 61st section of the later Act has not been complied with, and that therefore the rate is wholly bad. This was not necessary for the decision of *M'Kenna's Case* (1), nor was it so decided by the Court. It might be argued that the signature of the rate-book in this case by six urban councillors, one of whom was chairman, fulfilled what is prescribed by both Acts, but I prefer to rest my judgment upon the repeal of section 61. The last half of the section has been expressly repealed. The first half is inconsistent with later statutory requirements, as has been shown by Mr. Henry, and is, in my opinion, repealed by implication. Therefore I cannot hold the rate bad on the ground with which I am dealing.

Another point remains. The rate was struck for the last two years on the defendants' premises in the way described by the Lord Chancellor. On the findings of fact by Dodd J., the rate thus assessed on the defendants in the rate-book was less than it ought to have been by law. Therefore, after all the rate so assessed in one year, and part of that in the following year, had been paid, the plaintiffs purported to amend the rate under the provisions of section 174 of the Act of 1847. We are to decide whether such amendment was legal. One of the occasions of amendment as stated in the statute is "if it appear that the person rated has been under-rated or over-rated." The amendment in this case was made to correct an error by under-rating. The only objection taken is that the original rate was in whole or in part paid, and

(1) 38 I. L. T. R. 18.

that it was then too late to amend. I can find no such limitation in the section, and furthermore I am of opinion that as a right to appeal is given by the statute against the amendment, it cannot be corrected in any other way.

I fear that my observations have extended beyond the limit I proposed. Indeed it would have been enough for me to say that I concur in the Lord Chancellor's judgment.

CHERRY L.J. concurred.

Solicitors for the plaintiffs: *Brown & M'Cann.*
Solicitor for the defendants: *Croker Barrington.*

R. ST. J. C.

K. B. Div. 1913. Nov. 13. *Appeal.* 1914. Jan. 29. Feb. 2.

THE KING (MONTGOMERY) *v.* THE LORD MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF BELFAST (1).

Lands Clauses Acts—Local Government—Compulsory Acquisition of Lands—Maps or Plans and Schedules—Requisites of—"Distinct Valuation to each Number"—Mandamus—Railways Act (Ireland), 1851 (14 & 15 *Vict. c.* 70), *s.* 4—*Belfast Corporation Act*, 1911 (1 & 2 *Geo. 5, c.* cxc), *s.* 3.

Section 4 of the Railways Act (Ireland), 1851, provides that maps or plans, and schedules, of lands proposed to be taken compulsorily are to be made out, and deposited as therein provided, with the names of the owners, lessees, and occupiers, and estimates of the gross annual value and the value in fee of the lands, and that "all lands, buildings, yards and courtyards, and lands within the curtilage of any building, and ground cultivated as a garden, shall be marked thereon with distinct numbers corresponding with the numbers marked upon the Parliamentary plans of the railway, and shall have put thereon a distinct valuation to each number."

A corporation was empowered by a statute, which incorporated the Railways Act (Ireland), 1851, to acquire compulsorily lands for certain objects. They made out, and deposited as prescribed by the Railway Act (Ireland), a schedule in which, where several units marked with distinct numbers were held by the same owner in fee under the same title, a single sum representing the aggregate annual value of such units was set out, and a single sum representing the aggregate value of the fee of such units was set out, but no figures were given showing the annual value or the value in fee of each unit. On an application by the owner for a writ of mandamus directing the corporation to deposit maps or plans and schedules bearing a distinct valuation to each number:

Held, by the Court of Appeal (reversing the order of the King's Bench Division granting such mandamus), that the schedule sufficiently complied with the provisions of section 4 of the Railways Act (Ireland), 1851, and that it was not necessary where a number of units marked with distinct numbers were held by the same owner under one title, to state the value of the fee or the annual value of each such unit.

(1) In the King's Bench Division, before GIBSON and MOLONY JJ.

MANDAMUS.

This was an application to make absolute a conditional order directing that a writ of mandamus do issue against the corporation of Belfast, commanding them forthwith to deposit at the office of the Commissioners of Public Works in Ireland maps or plans and schedules of certain lands bearing thereon a distinct valuation to each number in accordance with the provisions of sect. 4 of the Railways Act (Ireland), 1851 (1), and to deposit a copy thereof at the office of the clerk of the peace for the county of the city of Belfast.

The prosecutor was the trustee of certain house property, held in fee-simple, situate in the city of Belfast. The Belfast Corporation, acting under the powers conferred upon them by the Belfast Corporation Act, 1911 (1 & 2 Geo. 5, c. cxc), sect. 3 of which incorporates, with the necessary modifications, the Railways Act (Ireland), 1851, proposed to acquire this property compulsorily for the purposes of an improvement scheme, and in pursuance of such determination prepared maps or plans and schedules purporting to be in accordance with the provisions of sect. 4 of the Railways Act (Ireland), 1851, and deposited the same at the office of the Commissioners of Public Works in Ireland on the 23rd April, 1913, and also deposited copies thereof with the clerk of the peace for the county of the city of Belfast, and also with the clerk of the poor law union in Belfast. The schedule, so far as material for the purposes of the present report, was in the form on pp. 38, 39.

The prosecutor, in his affidavit to ground the application, stated that there were no valuations set out on the deposited maps or plans, and alleged that the valuations appearing on the schedule were not distinct valuations to each number as required by sect. 4 of the Railways Act (Ireland), 1851, but an aggregate

(1) Railways Act (Ireland), 1851 (14 & 15 Vict. c. 70), s. 4:—"When and so often as any company authorized to make a railway to which this Act applies shall require to purchase or take any lands which they are by the special Act authorized to purchase or take, the company shall cause to be made out, and to be signed by their engineer and secretary, maps or plans and schedules of the lands so required (and for the purchase of which lands, or of all the several interests in which lands, the company shall not have

THE BELFAST CORPOR

DIVIS STREET, BARRACK STREET,

SCHEDULE AND ESTIMATE OF VALUE PURSUANT TO

No. on Plan.	No. in Street.	Townland and Street.	Description of Property.	Quantity of Land required, Statute Measure square yards.	Annual Value. £ s. d.	Value in Fee. £ s. d.	Owners or reputed Owners.
		Townparks.					
*	*	*	*	*	*	*	*
241	6	Pound Street.	Passage.	9	192 1 8	1455 6 6	Trustees Dr. Dunlop, owners in fee simple free of rent of, amongst other premises, 241 to 264 on plan, except 257, which is a public street.
241a	—	do.	Yard.	18	—	—	do.
242	8	do.	House and yard.	41	—	—	Trustees Dr. Dunlop.
243	10	do.	do.	36	—	—	do.
244	12	do.	do.	41	—	—	do.
245	14	do.	do.	48	—	—	do.
246	16	do.	do.	60	—	—	do.
247	18	do.	do.	50	—	—	do.
248	20	do.	do.	46	—	—	do.
249	22	do.	do.	50	—	—	do.
*	*	*	*	*	*	*	*
251	47a	Durham Street.	House, shop, and yard.	69	—	—	Trustees Dr. Dunlop.
252	49	do.	do.	85	—	—	do.
253	51	do.	do.	41	—	—	do.
254	53	do.	do.	44	—	—	do.
255	55	do.	House and yard.	39	—	—	do.
256	57	do.	do.	52	—	—	do.
*	*	*	*	*	*	*	*
258	3	Durham Place.	Passage.	20	—	—	Trustees Dr. Dunlop.
259	5	do.	Yard.	121	—	—	do.
260	7	do.	House.	25	—	—	do.
261	9	do.	do.	25	—	—	do.
262	11	do.	do.	25	—	—	do.
263	13	do.	House and yard.	25	—	—	do.
264	—	do.	Pound Burn.	130	—	—	do.

ATION ACT, 1911.

AND POUND STREET IMPROVEMENT.

THE PROVISIONS OF THE LANDS CLAUSES ACTS.

Value of Interests of Owners or Reputed Owners.	Lessees or reputed Lessees.	Value of Interests of Lessees or Reputed Lessees.	Occupiers.	Value of Interests of Occupiers.	Accommodation Works and Observations.
£ s. d.		£ s. d.		£ s. d.	
*	*	*	*	*	*
	Trustees Dr. Dunlop.	708 11 8			
525 10 6					
—	do.	—	Vacant.		
See No. 241 on plan.	do.	See No. 241 on plan.	Miss Lizzie Dunlop.	2 0 0	
—	do.	—	Gilbert Maher.	2 0 0	
—	do.	—	John Dowds.	2 0 0	
—	do.	—	John M'Elere.	2 0 0	
—	do.	—	Mary O'Neill.	2 0 0	
—	do.	—	Essey Dunn.	2 0 0	
—	do.	—	Patrick Skillender.	2 0 0	
—	do.	—	Vacant.		
*	*	*	*	*	
See No. 241 on plan.	Trustees Dr. Dunlop.	See No. 241 on plan.	Edward Gilliland.	10 0 0	
—	do.	—	Adam Hewitt.	5 0 0	
See No. 241 on plan.	John Kinney, lessee for 50 years from 1st May, 1903, of 253 to 256, and 258 to 259 on plan, at the yearly rent of £17.		S. M'Kenna.	2 0 0	The rent of £17 payable by John Kinney to Trustees Dunlop to be extinguished.
		191 4 4			
—	do.	—	Mr. M'Lorinan.	2 0 0	
—	do.	—	F. M'Donald.	2 0 0	
—	do.	—	Edward Gardiner.	5 0 0	
*	*	*	*	*	
See No. 241 on plan.	John Kinney, lessee for 50 years from 1st May, 1905, of 260 to 263 on plan and other premises, at the yearly rent of £25.		John Kinney.	0 0 1	John Kinney to continue to pay to Trustees Dunlop £17 10s. 0d. per annum.
		See No. 253 on plan.			
—	do.	—	Bernard Madden.	5 0 0	
—	do.	—	Vacant.		
—	do.	—	do.		
—	do.	—	do.		
See No. 241 on plan.	John Kinney.	See No. 258 on plan.	Vacant.		
0 0 1	The Durham Street Weaving Co.	See No. 239 on plan.	The Durham Street Weaving Co.	0 0 1	
	David Ross.	0 0 1	David Ross.	0 0 1	
	John Kinney.	See No. 258 on plan.	John Kinney.	0 0 1	
	James A. M'Gonigal.	See No. 230 on plan.	James M'Gonigal.	0 0 1	
	The Public.	—	The Public.		

K. B. Div. 1913.

REX (MONTGOMERY) *v.* BELFAST CORPORATION.

valuation put upon the entire of such numbers grouped together as constituted the whole interest of each particular owner. He further stated that he was dissatisfied with the valuation of £1234 2*s.* 2*d.* placed upon the owners' interest, and desired to contest its sufficiency; he would be seriously embarrassed in so doing if distinct valuations were not put upon each of the several numbers on the deposited schedule. Portions of the said lands were leased, and the remainder of the property was let on weekly and monthly tenancies, the entire lot producing a gross annual income of £128 10*s.* In answer to a letter from the prosecutor's solicitors, the defendants' solicitor supplied particulars of the separate annual value and value in fee of each of the numbers making up the aggregate, but gave no separate value of the interest of the lessees and owner respectively in each of such numbers. These additional particulars were written in red ink on a copy of the schedule which had been deposited, and were expressly stated as not being intended to be in substitution for the deposited schedule.

contracted) . . . together with the names of the owners or reputed owners, lessees or reputed lessees, and occupiers of the said lands respectively, so far as the same can be reasonably ascertained, with estimates of the gross annual value and the value in fee of such lands so required to be purchased or taken as aforesaid, and for the purchase of which, or of all the several interests in which, the company shall not have contracted, and the separate and distinct value of each such interest which the company shall not have contracted to purchase, so far as the same can be reasonably ascertained (taking into consideration damage by severance, and any other matters by the Lands Clauses Consolidation Act, 1845, required to be considered, if necessary); and every such map or plan shall be upon a scale of not less than one inch to every two hundred feet; and all lands, buildings, yards and courtyards, and lands within the curtilage of any building, and ground cultivated as a garden, shall be marked thereon with distinct numbers corresponding with the numbers marked upon the Parliamentary plans of the railway, and shall have put thereon a distinct valuation to each number . . . and the company shall deposit such maps or plans, schedules and estimates, at the office of the Commissioners of Public Works in Ireland, and a copy of such maps or plans, schedules and estimates, or so much thereof as relates to every county in or through which the railway is proposed to be made, with the clerk of the peace of each such county, and a copy of so much of the said maps or plans, schedules and estimates, as relates to each electoral division in which any such lands shall be situate, with the clerk of the poor law union in which every such electoral division is situate."

The prosecutor refused to accept this additional information as a compliance with his demand for the deposit of a schedule prepared in the form required by statute. On the 7th May, 1913, the corporation published a notice of the appointment of an arbitrator, and on the same day the arbitrator appointed published a notice announcing that he would hold an arbitration on the 30th June, 1913, and proceed to inquire into the value of the lands proposed to be acquired.

In the affidavits filed on behalf of the Belfast Corporation it was stated that the maps or plans and schedules relating to the property in question had been prepared in accordance with the practice which had been uniformly adopted by the corporation for fifty years past, and that if they were compelled to frame their schedules upon the lines indicated by the prosecutor it would be quite impossible to carry out any large improvement scheme without enormously adding to the expense, prolonging the period of the arbitration, and adding immensely to the cost and work of preparing the schedules, without in any way assisting the claimants or the arbitrator in arriving at a conclusion relating to the prices that should be paid for the various interests in the lands acquired.

D. M. Wilson K.C. and *Newett*, for the prosecutor.

Ronan K.C., *Gordon K.C.*, *Best K.C.*, and *Thomas Harrison*, for the Belfast Corporation.

The arguments were similar to those in the Court of Appeal reported *infra*.

GIBSON J.:—

This case has been very fully argued. In our view the prosecutor is entitled to a mandamus, but the defendants can, of course, appeal if dissatisfied.

The most material point argued by Mr. Ronan was that on the true construction of section 4 of the Railways Act (Ireland), 1851 (14 & 15 Vict. c. 70). He insisted that the construction put upon it by the prosecutor would render it unworkable and impracticable; that it had never been followed by the corporation of Belfast; and that if it had to be adopted, it would paralyze promotors and arbitrators.

K. B. Div. 1913.

REX (MONTGOMERY) *v.* BELFAST CORPORATION.

Gibson J.

It is right to say with regard to the actual circumstances of the property, that there is no direct evidence as to how the property was circumstanced. I would gather from the figures in this revised list put in by the corporation that several of the houses which are the subject of those Parliamentary plans are held by the respective occupants thereof as direct tenants to the applicant trustees.

The argument of Mr. Ronan and of Mr. Gordon is that what section 4 contemplates is that a separate valuation should be put upon each interest, so that where the plans with numbers describe separate lots held under a top landlord, that top interest should be accounted for as one, and that each derivative interest held by others was also to be accounted for respectively. The section says that there is to be a general valuation of the fee and the gross annual value; that separate interests are also to be valued; and that, in addition, there is to be a distinct valuation to each number on the plans. It does not say "distinct valuations" in the plural; "a distinct valuation to each number" is the phrase used, and, that is, I think, what was intended by Parliament.

The promoters, acting under their statute, prepared plans, and these plans described the property to be taken by them in separate numbers. Each of these numbers is to be valued as an entity in fee. In addition, the value of each separate interest is to be ascertained; but the valuation in question before us is not the valuation of each separate interest, but the capital aggregate valuation of each number. Mr. Ronan says that in certain cases it would cause great difficulty if each interest in the number had to be valued separately as a distinct integer. Mr. Gordon contends that if an owner in fee has four separate tenants, although each of these tenancies is valued separately, you are to value the owner only once for all the four rents as one capital integer. That is opposed to practice and every principle of valuation with which I am acquainted. Where there is a hierarchy of estates, one over the other, and each interest is to be valued separately in respect of each number, there may be some difficulty; but, in my opinion, the difficulty is more theoretical than practical. It is unavoidable where one tenement only is taken, held with others subject to a superior rent.

Mr. Gordon suggested that where the corporation intended to clear an area it might be a hardship on the owner to adopt the principle contended for by the prosecutor, because while the value of the cleared area, taken on the whole, might be considerable, the value of each tumble-down house constituting the particular number might be very small. I see no hardship at all. The question must be approached from the point of view of the value of the various plots occupied by houses with regard to their possibilities of value. What is the value of the fee-simple of that bit of ground, taking into consideration the fact that it may be fit for and devoted to a commercial enterprise?

I do not think the construction of the Act is of much difficulty, and the application for a mandamus, with which we are concerned, depends entirely upon the meaning of "a distinct valuation to each number." Each number, a thing coming into existence by the Parliamentary plans to be lodged in accordance with the statute, must have placed upon it a distinct and separate valuation representing the value in fee of that number.

Passing from that, we come to the next question. Mr. Ronan contends—this was his first and main argument—that if the prosecutor in this mandamus objects to the sufficiency of the estimates and plans which had been lodged, he is not entitled to the mandamus, because he had denied the validity of the arbitration established to carry out purchase under the plans and estimates. That is, I think, a mistake. It is perfectly certain that the moment after the promoters, authorized to take lands, deposit with the public department the prescribed documents, issue the prescribed advertisements, and the arbitrator is appointed, the whole statutory machinery is set up, and it is not competent for the promoters to say that they can make havoc of the legislation, and treat the owner's complaint that statutory directions have been disobeyed as a repudiation of the whole arbitration—a thing not within his power. What the owner is entitled to insist on is that the arbitration should proceed according to the statutory rules: *The Queen* v. *The Birmingham and Oxford Junction Railway Company* (1). Mr. Ronan suggests that

(1) 15 Q. B. 634.

K. B. Div. 1913.

REX (MONTGOMERY) v. BELFAST CORPORATION.

Gibson J.

if the objection to the arbitration succeeded, the promoters might not proceed to purchase this property. I asked, did counsel seriously contend that if the mandamus were granted they would discontinue? Of course such a thing was out of the question; and it is plain to my mind that, the arbitration having gone on a considerable time, it will be, and must be, prosecuted to conclusion.

The only matter for our consideration is whether we will allow the corporation, who have set up the arbitration in contravention of the Act of Parliament, not to give the information required. Construing the statute as they have done, they say they are under no obligation to give this information, or embody it in the documents before the arbitrator. The information actually given is imperfect information, not only in itself, but because the manuscript information is corrected by oral admissions, without any written or binding authorization. At present there is nothing to bind them. Their proposition is that they are not bound, and the arbitrator is not bound, by these statements; at all events, that they are not bound to this extent, that the arbitrator, in carrying out his duty, need not be bound by the collateral figures outside the official papers lodged, and that the other figures were only a help to him, but were not to form the basis of his award. That is not what the statute says. The statute directs that there must be a "distinct valuation to each number," and of each separate interest. The arbitrator who proceeded without these official figures would incur serious responsibility. Public officials like arbitrators are subject to mandamus if they fail to perform their duty, or take into account matters which go beyond their competence: *The Queen* v. *Rynd* (1).

This new information, itself imperfect, is given deliberately in a form which deprives the prosecutor of the protection he is entitled to under the statute. It is given collaterally and independently of the official document; the corporation declined to insert it in that document to guide and control the arbitrator, and in my opinion Mr. Wilson is entitled to have the conditional order made absolute.

(1) 16 I. C. L. R. 29.

We will grant a peremptory mandamus, and the parties can at once go to the Court of Appeal.

MOLONY J. concurred.

C. L.

The Belfast Corporation appealed (1).

Ronan K.C. and *Gordon K.C.* (with them *Thomas Harrison*), for the appellants:—

The first question is whether the schedule lodged by the corporation is a sufficient schedule within the statute. The section in question is sect. 4 of the Railways Act (Ireland), 1851. That section has been substituted in this country for sect. 18 of the Lands Clauses Act, 1845, so far as compulsory acquisition of land is concerned. It provides that the corporation, when they propose to take lands, must make out maps or plans and schedules, and deposit them at the office of the Commissioners of Public Works, and it proceeds: "every such map or plan shall be upon a scale of not less than one inch to every 200 feet; and all lands, buildings, yards and courtyards, and lands within the curtilage of any building, and ground cultivated as a garden, shall be marked thereon with distinct numbers corresponding with the numbers marked upon the Parliamentary plans of the railway, and shall have put thereon a distinct valuation to each number." The Court below held that that implied there should be a distinct valuation as to every interest in each number. The appellants submit that is not so. The object of the statute is to buy out the interest of all people having an interest in the lands acquired. The statute contemplates an entire valuation of each single interest of owner, lessee, and occupier, and not only is there no necessity to put a distinct valuation of every interest in each number, but such a course would be impracticable.

Mandamus does not lie. There is no power to amend the schedule. The appointment of the arbitrator is like a notice to

(1) In the Court of Appeal before O'BRIEN L.C. and HOLMES and CHERRY L.JJ.

Appeal. 1914.

REX (MONTGOMERY) v. BELFAST CORPORATION.

treat. If a land-owner repudiates a notice to treat, it is open to the promoters to accept the repudiation, put an end to the notice, and withdraw: Fry on Specific Performance (5th edition), p. 62. If the Court decides against the appellant on the sufficiency of the schedule as deposited, then, since the prosecutor has treated the appointment of the arbitrator, which is the same as a notice to treat, as a nullity, the promoters are under no obligation now to take the lands or to lodge other maps or schedules: *Wild* v. *Woolwich Borough Council* (1). The prosecutor's case really is that the steps taken by the corporation to acquire these lands are a nullity; and then he asks for a peremptory mandamus to compel them to begin again. On the whole case the appellants submit that taking this involved 4th section of the Railways Act (Ireland), 1851, and comparing it with the 18th section of the Lands Clauses Act, 1845, for which it was substituted, and under which the sufficiency of the schedule clearly could not be questioned, the substance of the transaction is that every party on the schedule is to know what are the lands belonging to him that are going to be taken, and what amount he is to get for his interest.

[They referred to *Shepherd* v. *Corporation of Norwich* (2).]

R. F. Harrison K.C., and *D. M. Wilson K.C.* (with them *Newett*), for the prosecutor:—

This was the first Act by which promoters were bound to acquire at the same time all estates and interests in lands, and compensate everyone who had an interest in them. The essential basis of the valuation is the valuation of the fee, and it is necessary for any general scheme that there should be a distinct valuation of the fee in each number. This is what the statute requires. Bodies like the Corporation of Belfast, who are empowered by Act of Parliament to take land compulsorily, must comply with all the conditions imposed by the statute: *Blakemore* v. *Glamorganshire Canal Navigation* (3). Where they have a statutory

(1) [1910] 1 Ch. 35.
(2) 30 Ch. D. 553.
(3) 1 Myl. & K. 154, at p. 163.

duty to perform, and do not discharge it, a mandamus will lie to compel them to do so: *Rex* v. *Stepney Corporation* (1). The prosecutor could not challenge the award, since section 9 of the Railways Act (Ireland), 1851, declares that no award shall be set aside for irregularity; therefore his only means of securing the information prescribed by the statute was by mandamus. Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf: *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (2). Once the corporation showed unequivocally by their maps, plans, and conduct that they were going to take certain lands, and started the machinery for compulsorily acquiring them, they must go on and complete the undertaking in accordance with the terms of the statute. *Wild's Case* (3) does not apply, for here the lands are set out, and everything done to make a binding contract. As to the form of the mandamus, when the facts are not in controversy the peremptory form is now the usual one.

[They also referred to *Morgan* v. *Metropolitan Railway Co.* (4).]

Counsel for the appellants were not called on in reply.

O'BRIEN L.C.:

A peremptory mandamus was issued by the King's Bench Division directing the corporation of Belfast to deposit forthwith at the office of the Commissioner of Public Works, maps or plans and schedules of the lands which they proposed to acquire, bearing thereon a distinct valuation to each number in the schedule, in accordance with the provisions of section 4 of the Railways Act (Ireland), 1851, and to deposit a copy thereof at the office of the Clerk of the Peace in Belfast.

It was contended in the Court below, and successfully, that a

(1) [1902] 1 K. B. 317.
(2) [1892] A. C 498.
(3) [1910] 1 Ch. 35.
(4) L. R. 4 C. P. 97.

Appeal. 1914.

REX (MONTGOMERY) *v.* BELAST CORPORATION.

O'Brien L.C.

distinct value of the fee and of every interest in respect of each number in the schedule was requisite under the statute.

It was stated on affidavit, and I have no doubt it is the fact, that the schedule in this case was framed in accordance with the practice that has prevailed in Belfast, and I believe elsewhere, during a period of about fifty years. The contention of the respondents would, if acceded to, alter the practice hitherto in force, and in my opinion the altered practice would lead to inconvenience and expense, and possibly in some cases to unfairness.

Under the Lands Clauses Act this question, it is admitted, could not arise in England; but it is discovered now, after a long interval subsequent to the passing of the Irish Act, that in all cases, including cities, a different and to my mind a cumbrous and unnecessary practice is obligatory. Of course we must construe the Railways (Ireland) Act, 1851, on its own terms; but I think that when we find a convenient and simple practice in England followed during so many years in Ireland, we must approach the section of the Irish Act with great caution before placing on it a construction inconvenient, as it seems to me, and non-prevalent under the Lands Clauses Act. I am satisfied as a fact that no inconvenience has been caused or injustice done to the prosecutor by the schedule as lodged and framed.

The corporation have to acquire the fee, and the value of each person's interest in the fee and the value of lesser interests, which must be paid for if taken, have to be estimated on the schedule. The maps and plans are required as part of the machinery for assessing the value of these different interests.

I am satisfied that there is a literal compliance with the requirements of sect. 4, and as I am satisfied that to follow any other practice would be inconvenient, expensive, and unnecessary, I think I am bound to hold that the corporation have sufficiently discharged their statutory obligations in this regard.

The section requires that the maps and schedules are to be—(1) schedules of the lands required and to be purchased otherwise than by contract; (2) to contain the names of the owners, lessees

and occupiers; (3) estimates of the gross annual value and the value in fee of the lands required to be purchased; and (4) a separate and distinct value "of each interest" which the company are to acquire by compulsory purchase.

Now, if we take the present schedule, we find so far that it complies with this substantial part of the section. The lands are set out; the names of the owners, lessees, and occupiers are set out; and the gross annual value and the value in fee of the lands are also set out. The only fee to be acquired is the fee-simple interest of the trustees of Dr. Dunlop, which includes a number of premises, some of which are in the occupation of the trustees and others not, but all of which are distinctly set out each under its appropriate number. Other interests there are in the property of which the trustees of Dr. Dunlop are owners in fee. Some of these are the interests of lessees, others are the interests of occupiers who it is considered are to be compensated. The value of each interest is, in fact, set out opposite each owner of this interest.

The only thing of substance that seems to me to be complained of is that the value of the fee of the trustees of Dr. Dunlop is not split up in respect of each parcel of land designated by a separate number. As I have said, the whole of the fee is to be acquired; and although I have endeavoured to discover why, in common sense or fairness, this interest should be so split up, I have failed to discover a reason. That, however, is no answer if the statute requires a different course to be followed, as the Court below was of opinion it did.

This brings me to the second part of the section. This part of the section does require a distinct valuation to be placed on each number, but the natural construction of the section appears to me to be that this distinct valuation is to be a valuation of the interest of each person in each piece of land numbered, which is to be as an interest separately acquired. In this view of the section a distinct valuation is placed on each interest opposite each number, including the Dunlop interest as a fee-simple designated as No. 241.

The schedule shows that this interest covers all the lands from 241 to 264, so far as the Dunlop interest is to be acquired.

Appeal. 1914.

REX (MONTGOMERY) *v.* BELFAST CORPORATION.

O'Brien L.C.

There is then set out under each number separately each piece of land, showing what lessee or occupier it is in possession of; and, finally, there is given opposite each number a valuation of each of the interests of each lessee or occupier in each piece of land to be acquired.

The words "and shall put thereon a distinct valuation to each number" I think must be read reasonably, and in connection with the earlier part of the section, and only require a distinct valuation to each number so far as is necessary for showing clearly the valuation which is rendered necessary by reason of having to divide up larger parcels of land into smaller and distinct parcels in which there are in fact separate and distinct interests arising from sub-letting, sub-division of the fee by fee-farm grants, and the like.

Finally, it seems to me that the practice that has been in existence for years not only in Belfast, but in other places, is the correct and practical one, and that the other construction argued for here is a non-practical one. That being my view and that of the Court, the second question that has been argued here does not arise, and the order of the Court below ought to be discharged.

HOLMES L.J.:—

The circumstances that have led to this litigation are somewhat curious. The Corporation of Belfast had compulsory powers to take certain lands for improvement schemes, and the owners in fee of the lands in the present case are trustees, of whom Mr. Montgomery is one. The Corporation of Belfast determined to acquire these lands, and in these circumstances prepared a schedule, and deposited it in the way prescribed by the Act of Parliament, and I presume that it was carefully examined by the solicitor for the relator. It is sworn here that that schedule was prepared in the same form and way as schedules have been prepared for fifty years past in carrying out improvement schemes under the Lands Clauses Acts and the Railways (Ireland) Acts, during which period the corporation, as I am sure, have acquired large properties;

and we have been told that in other places the same practice has prevailed. This schedule, being deposited in this way, was examined by the solicitor for the relator; and instead of saying at once "your schedule is wrong altogether, you have not carried out the terms of the Act of Parliament," a correspondence ensued between him and the representatives of the Belfast Corporation; and we have been told that various questions have been asked, and that these questions were answered, and I understand that this document put forward as a model is based on that information. After all that was done, after all that trouble, before the arbitrator was allowed to arbitrate, this question was raised, so far as I am aware for the first time in any case, as to whether the schedule in this form was a compliance with the section that directs the lodgment of a schedule. It seems to me there were some very acute persons looking out for a point of law, with a view to embarrass the corporation, and put difficulties in the way. Under these circumstances, the first thing a person ought to look at is the schedule itself, and try to form an opinion as to whether that schedule does not give to the owners in fee, Mr. Montgomery and his co-trustees, the fullest possible information to enable them to have the proper evidence before the arbitrator upon adjudication of the value of this land that was to be taken from them. I cannot understand what difficulty or embarrassment would arise in this case. At the same time, where there are compulsory powers given to a body to take land, and where there are certain provisions to be found in the statute giving these compulsory powers, presumably for the benefit of the person whose lands are to be taken, these provisions must be followed, even though we could not see what great advantage they would be to the person himself. And accordingly I look at the section. I quite admit that it is complicated in its terms, and that, at the first reading of both the first and the second parts, you might be slightly embarrassed by it; but when you come to read it in its entirety—I am only dealing with the case before us, and the mandamus before us—I think that the terms of the statute have been substantially complied with, and that the schedule is a good one; and it is to be noted that it follows what seems to me to have

Appeal. 1914.

REX (MONTGOMERY) v. BELFAST CORPORATION.

been the practice for a great number of years. I concur that the decision of the Court below should be reversed.

CHERRY L.J. concurred.

Solicitor for the Corporation of Belfast: *John M'Cormick.*

Solicitors for the Prosecutor: *Crawford & Lockhart.*

J. M.

MEEHAN *v.* TYNAN (1).

K. B. Div. 1914.

Dec. 10, 14.

Practice—Application by Personal Representative for Liberty to issue Execution—Application made on Notice—Order XLII, Rule 24.

Where a judgment creditor dies after judgment, an application by his personal representative for leave to issue execution should be made *ex parte*. The practice as to when applications under Order XLII, Rule 24 (*a*), should be *ex parte* and when on notice, stated.

MOTION ON NOTICE.

Application on behalf of the executors of the plaintiff for leave to issue execution. Judgment was marked on the 13th January, 1903. On the 12th February, 1913, the plaintiff obtained leave to issue execution, notwithstanding that more than six years had elapsed since the judgment. The plaintiff afterwards died, and his executors now applied, by motion on notice to the defendant, for leave to issue execution under Order XLII, R. 24.

Lupton, for the applicants:—

The application is made under Order XLII, Rule 24, for liberty to issue execution, the plaintiff having died.

[GIBSON J.:—Should not the motion be made *ex parte*?]

In Rule 24 (*a*) no distinction is made between lapse of time and change of parties. In the notes to that rule at p. 614 of Wiley's Judicature Acts, the practice is stated to be by motion on notice served for a particular day, on the authority of *Devitt* v. *M'Coy* (2) and *Furlong* v. *Furlong* (3). It is submitted that the practice, except in special circumstances, is to apply by motion on notice.

There was no appearance for the defendant.

Cur. adv. vult.

(1) Before GIBSON and BOYD JJ.

(2) 26 I. L. T. 403. (3) 26 I. L. T. R. 111.

GIBSON J. :—

A question of practice has been raised by Mr. Lupton in this case, relying on a passage in Wylie's Judicature Acts, p. 614, to the effect that in all cases where leave to issue execution under Order XLII, Rule 24, is necessary, the application should be made on notice. As it is stated that there is some uncertainty as to the practice in such cases, and as to costs, my brother Boyd and I have considered the matter with care, and our conclusion is as follows:—

The point was discussed in *The National Bank* v. *Cullen* (1), where the Lord Chief Baron gave an instructive judgment as to the various cases where leave to issue execution has to be applied for.

1. Where a judgment creditor dies, probate or letters of administration are conclusive as to the status of the personal representative, and the application under Order XLII, Rule 24, may be *ex parte*. Where the cesser of interest arises, not on death, but on disputable facts, such as assignment, there must be notice. In both cases the applicant bears his own costs.

2. If the judgment debtor dies, notice of the application to issue execution against his representative is required. In the absence of special words in the order giving leave, it might be contended that such representative was bound by an admission of assets, so that if the amount of the judgment could not be realized, he might in that view, if correct, be made liable for a devastavit in the same way as if judgment had been recovered against him as such representative. Whether this is so or not, as to which I pronounce no opinion, it is obviously desirable that he should have the earliest opportunity of explaining his position, so as to enable the Court, if necessary, to direct an issue. Where the representative does not appear on the motion it would seem proper to preclude question and safeguard him by limiting the execution expressly to assets, *if any*.

If Order XLII, Rule 24, applies to an executor *de son tort*, such executor would manifestly be entitled to notice. It would,

(1) [1894] 2 I. R. 683.

K. B. Div. 1914. MEEHAN v. TYNAN. Gibson J.

however, appear that the order does not so apply, for the reasons stated in my judgment in *Lord Westmeath* v. *Coyne* (1). Under the former practice a judgment could only be revived against a lawful representative. In *Cresswell* v. *Creswell* (2) Fitzgerald J. declined to make an order against executors *de son tort*. If Order XLII, Rule 24, does not apply in such case, the plaintiff might have to resort to an action on the judgment. Where assets are not admitted, there must always be a trial, whether on issue or otherwise.

Where the debtor's death is the cause of the application, the practice is to give costs of the motion.

3. Where the application is made necessary from lapse of time, notice of motion is essential, save under special circumstances: *National Bank* v. *Cullen* (3). If the delay is attributable to the creditor's laches, he gets no costs of motion. Where the delay is accounted for by the debtor's circumstances or position, the creditor is entitled to his costs of motion.

The applicant only asks for six years' interest, so that it is unnecessary to consider the effect of the order to issue execution obtained last year, or whether such order could be treated as equivalent to revivor under the old law, as to which see Lightwood on Limitations, ed. 1909, at pp. 166, 167. It would appear hardly reasonable that, owing to the accident of death of parties making an order under Order XLII necessary, liability for interest should be enhanced. I only notice the point to show that it is not being overloooked, and no opinion is expressed on it.

The Court granted the application, but without costs.

Solicitor for the applicants: *John J. McDonald.*

(1) [1896] 2 I. R. 436.
(2) 13 I. L. T. 374.
(3) [1894] 2 I. R. 683.

A. E. C.

THE KING (BALLYVAGHAN RURAL DISTRICT COUNCIL) *v.* THE LOCAL GOVERNMENT BOARD FOR IRELAND (1).

K. B. Div. 1914. Jan. 20. Feb. 24.

Local Government—Public Health Acts—"Special Expenses"—Area of Charge—"Contributory Place"—Dispensary District co-terminous with Rural Sanitary District—Jurisdiction and Discretion of the Local Government Board to determine Area of Charge—Power to include Area not benefited—"Within the district"—"In a rural sanitary district"—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *s.* 232 (2).

The Local Government Board, in exercise of the power of determining the "contributory place" to be charged with "special expenses" under the Public Health (Ireland) Act, 1878, may determine that a dispensary district shall be the area of charge for "special expenses" incurred by a rural district council, notwithstanding that in fact that dispensary district is identical in extent with the entire of the council's rural district, and that, consequently, such "special expenses" in their incidence will be identical with the "general expenses" under the Act. Meaning of the words "within the district" and "in a rural sanitary district" in section 232 of the Public Health (Ireland) Act, 1878, explained.

The area of charge of special expenses need not necessarily be confined to the lands benefited by the works, and in determining such area the Local Government Board may take into consideration the circumstance that the place benefited would not be able to bear the expenses.

(1) Before PALLES C.B. and BOYD and DODD JJ.

(2) Public Health (Ireland) Act, 1878, s. 232:—"The expenses incurred by a rural sanitary authority in the execution of this Act shall be divided into general expenses and special expenses. General expenses, other than those chargeable upon owners and occupiers under this Act, shall be the expenses of the establishment and officers of the sanitary authority, and all other expenses not determined by this Act or the order of the Local Government Board to be special expenses. Special expenses shall be the expenses of the construction, maintenance and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place . . . and all other expenses incurred or payable by the sanitary authority in or in respect of any contributory place within the district, and determined by the order of the Local Government Board, to be special expenses. . . General expenses shall be payable out of a common fund to be raised out of

K. B. Div. 1914.

REX (BALLYVAGHAN RURAL DISTRICT COUNCIL) *v.* LOCAL GOVERNMENT BOARD.

CERTIORARI.

This was a motion on notice served by leave of the Court for an absolute order of certiorari to bring up and quash an order of the Local Government Board, dated the 26th September, 1913, determining that the Ballyvaghan dispensary district, as constituted at the date of the order, should be the area of charge for expenses incurred, or to be incurred, by the council of the Ballyvaghan rural district for the purpose of improving the water-supply and maintaining the same at Lisdoonvarna, situate in the said dispensary district and rural district.

The prosecutors had promoted a scheme for the improvement of the water-supply at Lisdoonvarna, a town situate in the electoral division of Lisdoonvarna, within the council's rural district. The estimated cost of the scheme was £2,000, and in the application for sanction for loans to meet this expense, the council suggested that the electoral division of Lisdoonvarna should be made the area of charge for repayment. The total rateable value of the rural district was £20,426 made up of eleven electoral districts, the respective rateable values of which were as follows:—Abbey, £2,700; Carren, £1,865; Castletown, £1,612; Derreen, £1,125; Drumcreehy, £1,689; Gleninagh, £888; Lisdoonvarna, £2,639; Mount Elva, £2,251; Noughaville, £2,564; Oughtmame, £1,427; and Rathborney, £1,664. The dispensary district of Ballyvaghan was identical in dimensions with the rural district of Ballyvaghan, and it therefore comprised all the above electoral divisions. The intended scheme when

the poor rate of the electoral divisions or parts thereof in the district, according to the rateable value of each electoral division or part thereof. Special expenses shall be a separate charge on some contributory place or places. The following areas situated in a rural sanitary district shall be contributory places for the purposes of this Act; that is to say—(1) the dispensary district; (2) the electoral division; (3) the townland; (4) such portions of any townland or townlands as may be determined by the Local Government Board: Provided that the Local Government Board shall have power to determine on what area of charge being a contributory place, or consisting of contributory places, any special expenses shall be chargeable, whether incurred after the passing of this Act or still due in respect of works executed before the passing of the Act"

carried out would only confer benefits upon the electoral division of Lisdoonvarna and the town of Lisdoonvarna. The Local Government Board, by their inspector, Mr. Price, held a local inquiry, and in a letter from the Board to the Council, dated 10th June, 1913, the Board intimated that, as the result of that inquiry, a sealed order was being prepared by which the Ballyvaghan dispensary district was being made the area of charge for repayment of the loans sanctioned by the Board. It appeared from this letter that the Board, in thus determining the area of charge, had taken into consideration the exhausted financial condition of the suggested area, viz. the electoral division of Lisdoonvarna, and the Board suggested that the ultimate sum to be levied out of the rates in respect of the scheme could be made small, as the council could fix a water rent, and would be justified in charging the improvement committee of the town of Lisdoonvarna an inclusive sum of £70 per annum for the benefit of the increased water-supply. The improvement committee, the trustees of the mineral springs of Lisdoonvarna, refused to make the suggested contribution.

The order made by the Local Government Board was as follows:—

Local Government Board for Ireland, Rural District of Ballyvaghan.

To the council of the administrative county of Clare: to the council of the rural district of Ballyvaghan, and to all whom it may concern.

Whereas in pursuance of the Public Health (Ireland) Acts, 1878 to 1900, and the Local Government (Ireland) Acts, 1898 to 1902, the council of the rural district of Ballyvaghan have incurred, or are about to incur, special expenses (as defined by the Public Health (Ireland) Act, 1878), for the purpose of improving the supply of water and maintaining the same at Lisdoonvarna, situate in the Ballyvaghan dispensary district, in the said rural district; and it is provided by the said last-mentioned Act that we, the Local Government Board for Ireland, shall have power to determine on what area of charge, being a contributory place

K. B. Div. 1914.

REX (BALLYVAGHAN RURAL DISTRICT COUNCIL) *v.* LOCAL GOVERNMENT BOARD.

or consisting of contributory places, any special expenses shall be chargeable; and whereas a dispensary district situated in a rural district is a contributory place within the meaning of section 232 of the said Public Health (Ireland) Act, 1878: now, therefore, we, the Local Government Board for Ireland, in exercise of the powers vested in us by the aforesaid Acts, and by all other statutes in this behalf enabling us, do hereby order and determine that the Ballyvaghan dispensary district, as constituted at the date of this order, shall be the area of charge on which all expenses incurred, or which may be incurred, by the council of the said rural district for the purposes aforesaid shall be chargeable.

Given under our seal of office, this 26th day of September, in the year of our Lord 1913.

The grounds upon which the certiorari was sought were as follows:—

"That the said order was bad on the face; that the said order was made without, and in excess of, jurisdiction; that the said Local Government Board had taken into consideration in making said order an element which by law they were not entitled to take into consideration; that the contributory place specified in the said order as the area of charge for all expenses incurred or to be incurred by the rural district council of Ballyvaghan for the purposes specified in said order is not the contributory place in respect of which said expenses are or may be incurred, and that the Local Government Board, in making such order, did not have due or any regard to the necessary relation between the contributory place in respect of which special expenses under sect. 232 of the Public Health (Ireland) Act, 1878, are or may be incurred, and the contributory place for the purpose of raising said special expenses; that the Local Government Board, in determining the contributory place specified in said order as the area of charge for raising special expenses, proceeded on wrong principles and not in accordance with (or under the jurisdiction conferred by) section 232 of the Public Health (Ireland) Act, but in violation of same; that an area co-terminous with the entire rural district of Ballyvaghan is not a contributory place for the purpose of raising special expenses under the Public Health (Ireland) Acts, and that the Local Government Board had no

jurisdiction to fix such an area as a contributory place for the purpose of raising special expenses incurred or to be incurred solely in respect of a smaller area within said rural district, said smaller area being itself a contributory place within the meaning of said Acts; that the dispensary district of Ballyvaghan, comprising and commensurate with the entire rural district of Ballyvaghan, is not a contributory place within the meaning of said Acts."

Ronan K.C. (with him *Lynch K.C.* and *M. Comyn*), for the prosecutors:—

The Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), provides, by section 232, that "special expenses" shall be charged upon a "contributory place" or "contributory places" to be determined by the Local Government Board. The Public Health (Ireland) Act, 1900 (63 & 64 Vict. c. 10), by sect. 1, sub-s. 2, provides that "special expenses" shall not be charged upon the entire area of the district without the consent of the council. The Act of 1878 defines "contributory place" as "a contributory place *within* the district," and it specifies as "contributory places" "the following places *in* a rural sanitary district," i.e., dispensary districts, electoral divisions, townlands, and portions of townlands. The expenses in question here are admittedly "special expenses," and by the order of the Board the area of charge selected is a "dispensary district"; but the dispensary district selected by the order is one which is identical in extent with the rural sanitary district, and as a result of the order the incidence of these "special expenses" is identical with the incidence of "general expenses." The Act of 1878 draws a clear distinction between "special" and "general" expenses; the former are chargeable only upon a "contributory place" or "contributory places"; the latter are charged upon the whole rural sanitary district, and the Act of 1900 provides that the incidence of the former cannot be converted into the incidence of the latter without the consent of the council: *The King* (*Ballycastle R. D. C.*) v. *Local Government Board* (1). Where

(1) [1904] 2 I. R. 270.

K. B. Div. 1914.

REX (BALLYVAGHAN RURAL DISTRICT COUNCIL) v. LOCAL GOVERNMENT BOARD.

the Legislature has thus (*a*) enacted that "special expenses" are to be chargeable upon a "contributory place," and (*b*) forbidden the charge of these expenses upon the whole district without consent, it is plain that the intention was that "special expenses" are to be chargeable upon a selected area less than the whole area of the rural sanitary district. "In" in section 232 must be read in the same sense as "within" in the same section. A place "in" or "within" another predicates a component less in extent than its continent, and contributory is an inapplicable qualification for a district which in fact pays the whole of the expenses to which it is treated as being a contributory; a sole mortgage, for instance, could not be a "contributory" mortgage. The scheme of the Public Health Acts is, obviously, that the Board in its power to select "contributory" places as areas of charge for "special expenses," has jurisdiction only to select some place or places "within" the rural sanitary district, that is some place or places less in extent than that district; otherwise the provisions as to consent to the charge of "special expenses" upon the entire district are nugatory.

Further, the Board cannot aggregate contributory places unless each of these is benefited: *Ballycastle R. D. C.* v. *Local Government Board* (1). The area of charge to be selected must be a "contributory place" in or in respect of which the expenses have been incurred; but here admittedly Lisdoonvarna alone is the place which will benefit by the present scheme, and in result, under this order, the electoral division of Lisdoonvarna will contribute about one-eighth of the expenses, ten other electoral divisions contributing the remaining seven-eighths.

Finally, as appears from the letter of the Assistant Secretary, the Board considered in their determination the question as to the financial condition of the electoral division of Lisdoonvarna, but that was a matter which the Board had no jurisdiction to consider.

Jellett K.C., and *Herbert Wilson K.C.* (with them *Wylie*), for the Board:—

"In" and "within" are words quite applicable to a district which is co-terminous with, but does not exceed, the area of the

(1) [1904] 2 I. R. 270.

rural district. The statute purposely leaves a wide discretion to the Board in the selection of the area of charge for "special expenses," and the area here selected is precisely one of the classes of "contributory place" specially named by the Act. Mr. Ronan's argument would read into the clear provisions of the statute additional words which are not required, the language of the enactment being unambiguous. "Contributory" is by no means necessarily inapplicable to a district which is co-extensive with the rural district; and, in any event, "contributory" must be here read in relation to the subject-matter of the statutory enactment. There is nothing in the statute which prevents the Board considering the matters which were here considered; on the contrary, the whole frame of the statute shows that the widest discretion in selection is purposely given to the Board.

The Board has followed the course prescribed by the statute; it has selected an area of charge from one of the classes of "contributory places" mentioned by enactment, and in that selection has exercised the discretion which the statute shows is desirable, and which is expressly reserved by the Act. If this dispensary district cannot be made the area of charge the financing of the scheme is impossible.

Lynch K.C., in reply.

Cur. adv. vult.

Feb. 24.

PALLES C.B.:—

The expenses mentioned in the order are "special expenses" within the meaning of sec. 232 of the Act of 1878 (41 & 42 Vict. c. 52), and, by that section, are to be a separate charge on some contributory places or contributory place. By the same section, a "contributory place" is defined as consisting, *inter alia*, of a dispensary district. The special expenses here are charged on a "dispensary district," consequently the order is, prima facie, right.

This particular dispensary district, and consequently this "contributory place," is co-extensive with the entire rural district, and expenses in relation to such a district are to be raised in substantially the same manner as general expenses. The Act draws a marked distinction between the modes of raising "special

K. B. Div. 1914.

REX (BALLYVAGHAN RURAL DISTRICT COUNCIL) *v.* LOCAL GOVERNMENT BOARD.

Palles C.B.

expenses" and "general expenses," and, in order to give effect to this distinction, Mr. Ronan argues that the expression "the dispensary district" in section 232 must receive some qualification or restriction, and he asks us to read it as "the dispensary district *being part of* a rural district." In support of this contention he relies on (1) the general scheme of sections 232 and 233 of the Act; (2) upon the word "contributory," which he suggests is inapplicable to a place which is to bear not part only, but the entire, of a given burthen; and (3) the expressions "in" and "within" the district applied to a contributory place, which he insists are grammatically inapplicable to the totality of a district in or within which it is described as being situate.

As regards the general scheme of the section, I freely admit that the Legislature drew a marked distinction between "general expenses" and "special expenses," and that, speaking generally, it did not intend that in any case they should have the same incidence of taxation. Whilst "general expenses" were to be payable out of a common fund, to be raised out of the poor rate of the entire district, "special expenses" were to be borne by the locality in or in respect of which they were incurred, or some adjacent locality. Had the intention of Parliament been that they should be borne strictly by the locality benefited, it would have been easy to have said so, and to have prescribed a public enquiry to ascertain the exact extent of such locality. Much inconvenience, however, might have been caused by such a scheme, as the rate for each work which did not benefit the entire district might have been imposed upon different areas, differing from each other in only small particulars, but causing vast complication in the rate-book.

The scheme of the Legislature was to depute to the Local Government Board, in every case, the determination of the area of charge for special expenses; but this deputation was made subject to the condition that the area to be determined should be a contributory place or places in or in respect of which the special expenses in question had been incurred. The extent of the jurisdiction and discretion of the Local Government Board, therefore, depended upon what the Legislature should define to be "a contributory place," and the definition adopted conferred upon

the Board an extremely wide discretion. A contributory place might be a small part of a townland; it might be an entire townland; it might extend to an electoral division, and even to the entire of a dispensary district, which we were informed at the Bar (but which I think was not brought to the knowledge of Parliament) extended, in two instances, of which the present is one, to the entire rural district. The only limitation to their jurisdiction is that the "contributory place" shall be one in, or in respect of, which expenses were incurred, but, subject to that, it might extend, as it does in the present case, from an area of a small valuation (say of £2000) to that of one of upwards of £20,000. Further, "special expenses" are defined to include, in addition to certain specified classes of expenses incurred in or in respect of any "contributory place," "all other expenses incurred in or in respect of any contributory place determined by the Board to be special expenses," and "general expenses" are defined to include, *inter alia*, "all other expenses not determined by the Act or the Board to be special expenses." Thus the Board, in addition to the power it derives from being able to determine the contributory place, may, by omitting to make an order that particular expenses, although incurred in or in respect of a contributory place, are special expenses, render them "general expenses." All I can gather from the general scheme of the section is a suspicion that the Legislature was not aware that, in two instances, a "dispensary district" was co-terminous with a rural district.

The second matter relied upon by Mr. Ronan is the alleged inapplicability of the word "contributory" to a place which may extend to the entire area. I think that section 233 shows that "contributory" means "contributory to the poor rate," and in this sense it is not strictly inapplicable.

The matter, however, mainly relied on by Mr. Ronan is the use in section 232 of the words "*within* the district," and "*in* the district." "Contributory place" is there spoken of as "contributory place within the district," and "the following areas situated in a rural sanitary district shall be contributory places."

A familiar use of the word "within" is, as opposed to "without,"—"within the city." It may also with propriety be

K. B. Div. 1914.

REX (BALLYVAGHAN RURAL DISTRICT COUNCIL) *v.* LOCAL GOVERNMENT BOARD.

Palles C.B.

used as including that which reaches to the full extent the limit of that which it is said to be within, as, for example, "within twenty miles of Dublin" includes that which extends to that limit. Therefore we must see in what sense is the word used in this 232nd section. It is a section ancillary to, and which must be read with, section 233, and together they constitute a taxing enactment. They enable a rate to be made on a contributory place. The area over which the jurisdiction to tax extends is the "rural district," and I am clearly of opinion that the words "within the district" qualifying "contributory place" have for their object the limitation, by express words, of the power of taxation to that subject-matter which alone was within the power of the taxing body to tax. In determining a contributory place the Local Government Board, of course, had no power to extend it beyond the limits of the rural district in which the special expenses were incurred. That place should necessarily be "in" and "within" the rural district, and to express this is the scope of these words, which do not exclude a co-terminous district

So much for Mr. Ronan's contentions. I am far from saying that some general intention may not be gathered from section 232 that there should not be the same area of rating in respect of "special expenses" and "general expenses." It is plain to my mind that the Legislature either overlooked, or was unaware of, the two instances in which the dispensary district was co-extensive with the rural district; but, be this as it may, I think we are bound to construe the Act as if the Legislature had the knowledge of the extent of these dispensary districts, and that, having in its mind a distinction between "general expenses" and "special expenses" in respect of the area from which they were to be raised, it framed in clear and express words an elaborate scheme constituting a special tribunal to which it delegated the power to determine the area of rating in respect of such "special expenses," and conferred upon it a large discretion, in the exercise of which that area need not necessarily be confined to the lands benefited by the work in respect of which the expenses were incurred. Notwithstanding the knowledge I impute to the Legislature, the discretion and jurisdiction imposed upon the Local Government Board included the power of dealing with the

two dispensary districts co-terminous with the two rural districts as contributory places, and I think I best construe the statute by giving effect to the machinery provided by the Legislature in its clear and expressed words. If it had a general intention that "special expenses" should be raised from an area less than that out of which general expenses were payable, it had a clear and definite intention that the result should ensue from the specific mode by which it prescribed that "special expenses" should be levied, and I am unable to cut down the jurisdiction of the Local Government Board, given by clear and particular words, so as to fit in with the vague general intention I have mentioned, if in fact it is to be gathered from the Act.

I am, therefore, of opinion that the "Ballyvaghan Dispensary District" was a contributory place within the meaning of section 232, although it was co-terminous with the Ballyvaghan rural district, and that, consequently, the order is not impeachable on the first ground relied on.

As to the second ground of impeachment relied on, viz., that although it was within the jurisdiction of the Local Government Board to make the order, yet the letter of their assistant secretary of June, 1913, showed that they took into consideration in fixing the area of charge the circumstances that the electoral division of Lisdoonvarna alone would not be able to bear the expenses, I am of opinion that it too is unsustainable. If one thing more than another is clear on the section, it is that the jurisdiction of the Local Government Board was not restricted to confining the area to the lands which were in fact benefited or which they were of opinion were benefited. This being so, I am of opinion that they were entitled to take into consideration all the matters stated in the letter.

The order is, therefore, valid, and the application for a certiorari to bring it up must be refused; but as the case is a difficult, if not a doubtful, one, which the district council were well justified in bringing forward, the refusal should be without costs.

BOYD and DODD JJ. concurred.

Solicitor for the Ballyvaghan Rural District Council: *John B. Lynch.*

Solicitors for the Local Government Board: *T. T. Mecredy & Son.*

C. N. K.

K. B. Div. 1914.

THE IRISH LAND COMMISSION *v.* O'NEILL (1).

Nov. 24, 26. *Moratorium—Postponement of Payments Act*, 1914 (4 & 5 *Geo.* 5, *c.* 11)—*Courts* (*Emergency Powers*) *Act*, 1914 (4 & 5 *Geo.* 5, *c.* 78)—*Irish Land Commission—Annuity—Crown Debt.*

A purchase annuity payable to the Irish Land Commission under the Irish Land Act, 1903, is a Crown debt, and, as such, does not fall within the provisions of the Courts (Emergency Powers) Act, 1914, or the Postponement of Payments Act, 1914.

MOTION.

Application for leave to enter up judgment upon a writ issued on foot of a Land Commission annuity.

The notice was in the following terms:—

"Take notice that on the 10th day of November, 1914, . . . counsel on behalf of the plaintiffs will apply for a direction to the proper officer to enter up judgment for the amount named in the writ herein, and that execution therefor do issue on foot of such judgment, on the ground that the said sum is a debt due to the Crown, and that the Crown is not bound by the provisions of the Postponement of Payments Act, 1914, or the Moratoria thereunder, or by the Courts (Emergency Powers) Act, 1914; and on the ground that the said debt is a debt due by statute, and that it is not a debt to which the Postponement of Payments Act, 1914, or the Moratoria thereunder, apply, which application will be grounded," etc.

The affidavit of Mr. William Alexander, the solicitor to the Irish Land Commission, set out:—

"1. That of the sum of £96 17*s.* 8*d.* claimed in the writ of summons issued in this matter on the 8th day of September, 1914, the sum of £58 17*s.* 8*d.* is due on foot of a Government annuity of £96 17*s.* 8*d.*, payable by the defendant to the plaintiffs under the provisions of a fiated agreement, dated the 1st day of June, 1907.

(1) Before MADDEN, BOYD, and KENNY JJ.

"2. The sum of £38 was paid to the plaintiffs after service of the said writ on the defendant.

"3. The said sum of £96 17*s.* 8*d.* represents two half-yearly instalments of the said annuity, which fell due on the 1st day of December, 1913, and the 1st day of June, 1914. The said sum of £58 17*s.* 8*d.* is now actually due by the defendant to the plaintiffs over and above all just and fair allowances.

"4. On the 2nd day of November, 1914, I applied to the proper officers of the Court to enter up judgment for the said sum of £58 17*s.* 8*d.*, but they declined to enter such judgment on the ground that they were precluded from doing so by the provisions of the above-mentioned Act of Parliament."

A. C. Meredith K.C. (with him *Babington*), for the plaintiffs:—

The sum claimed consists of instalments of a purchase annuity by means of which an advance made under the Land Purchase Acts is being repaid. The source of the advance was the Exchequer, and the destination of the instalments is the Exchequer. These facts without more are sufficient to constitute the debt a Crown debt. The plaintiffs are merely collecting-agents for the Crown, and have no discretion whatever as to the application of the moneys received by them on foot of instalments: Landlord and Tenant (Ireland) Act, 1870, sect. 55; Land Law (Ireland) Act, 1881, sect. 34, sub-s. 6; Irish Land Act, 1903, sect. 45; Irish Land Purchase Rules, 16th July, 1910, rule 6, sub-rule 1.

The instalments of purchase annuity are expressly recoverable in the name of the Attorney-General for Ireland: sect. 49 of the Act of 1870; sects. 28, 35, and 57 of the Act of 1881. The decision of the Court of Appeal in *Attorney-General* v. *Howley* (1) —a decision in respect of a loan by the Land Commission under sect. 31, sub-s. 2, of the Act of 1881—practically rules the case. See *per* Cherry L.J. at p. 132: "The liability of the borrower does not acquire its character of a Crown debt from these sections at all, but from its own inherent nature as money advanced by the Crown, and to be repaid to the Crown in certain instalments."

The Crown is not bound by the Postponement of Payments

(1) [1914] 1 I. R. 124.

K. B. Div. 1914.

THE IRISH LAND COMMISSION v. O'NEILL.

Act, 1914, or the Moratoria thereunder, or the Courts (Emergency Powers) Act, 1914, inasmuch as it is not expressly named, nor is there any necessary implication bringing it within the provisions of these Acts: *Hornsey Urban Council* v. *Hennell* (1); *Gorton Local Board* v. *Prison Commissioners* (2).

Jellett K.C. and *William Ryan*, for the defendant:—

The Land Commission pay interest at 2¾ per cent. plus 10*s.* per cent. to the Treasury. They collect an annuity of 3¼ per cent. from the purchaser. The remedies applicable to the recovery of the annuity are not applicable to the recovery of the interest. The annuity is an incorporeal hereditament: *In re Parkinson* (3); the interest payable by the Land Commission is not. The interest and the annuity are payable at different dates. The Land Commission are an independent tribunal established for the purpose, *inter alia*, of buying and selling estates, and have a discretion as to the spending of the money independent of the Treasury. This indicates they are not mere agents of the Crown for the distribution of money: *Fox* v. *Government of Newfoundland* (4). The Land Commission are registered as absolute owners of land: sect. 7, sub-s. 5, and sect. 16 of Land Act, 1903. In *The Attorney-General* v. *Howley* (5) the Board of Works were merely the servants of the Crown, acting under the 31st section of the Irish Land Act, 1881. But the 24th section of the same Act authorizes the Land Commission to make advances independently of the consent of the Treasury, and the 42nd section of the Land Act, 1881, gives the Land Commission power to acquire and hold land for the purpose of the Act. The Land Commission are an independent statutory corporation, created for statutory purposes, and in buying and selling estates they act in their corporate capacity, and not as agents of the Crown. In the case of a body created by statute the rule is that, in the absence of something to show a contrary intention, the Legislature intends that such body shall have the same duties, and that its funds shall be rendered subject

(1) [1902] 2 K. B. 73, at p. 80.
(2) (1904] 2 K. B. 165n.
(3) [1898] 1 I. R. 390.
(4) [1898] A. C. 667.
(5) [1914] 1 I. R. 124.

to the same liabilities, as the general law would impose on a private person doing the same thing: *Mersey Docks Trustees* v. *Gibbs* (1), *per* Blackburn J., at p. 110.

[They also referred to: *Wheeler* v. *Commissioners of Public Works* (2); *Graham* v. *Commissioners of Public Works* (3); *Gilbert* v. *Corporation of Trinity House* (4); *The Queen* v. *M'Cann* (5).]

Babington in reply.

MADDEN J.:—

In this case the Irish Land Commission issued a writ against O'Neill, claiming certain instalments of an annuity payable under the Land Purchase Acts. No appearance was entered, and under ordinary circumstances the plaintiff would have gone into the office and marked judgment. The officer properly refused to mark judgment without a direction from the Court, having regard to the provision of the Courts (Emergency Powers) Act, 1914, and the question for our decision is whether arrears of an annuity payable to the Land Commission under a purchase carried out under the Land Purchase Act of 1903 constitute a debt due to the Crown.

The Crown is not bound by an Act of Parliament unless it is specially named, or a necessary implication to this effect is to be drawn from the Act itself, or from the general course of legislation. The Crown is not specially named in the Emergency Powers Act, and it could not be contended that any necessary inference to this effect is to be drawn from other legislation.

It is necessary to consider the nature of the obligation which the plaintiffs seek to enforce in this action. The obligation arises under a sale carried out under the Land Purchase Act of 1903. All the Land Purchase Acts, from the Bright clauses in the Act of 1870 to the Act of 1903, are to be read together as one code. Their common object is to facilitate the purchase of land by tenants by means of an advance of public money, to be repaid by instalments in the form of annuity. If the proceeding in the

(1) L. R. 1 H. L. 93.
(2) [1903] 2 I. R. 202.
(3) [1901] 2 K. B. 781.
(4) 17 Q. B. D. 795.
(5) L. R. 3 Q. B. 677.

K. B. Div. 1914.

THE IRISH LAND COMMISSION v. O'NEILL.

Madden J.

present case had been to recover in a lump sum money advanced by the State on the purchase of a holding, the question would not have been arguable. It could not be contended that the obligation to repay money advanced by the State was other than a Crown debt. It matters not whether the debt is repayable in one sum or by instalments. The obligation to repay the money is the same, whether it is to be repaid in one sum or fifty sums.

Mr. Jellett recognized that he would have had great difficulty if he had to deal with a case before the Act of 1903, and his argument was mainly founded on the financial system established by that statute. I was glad that means were provided by which the defendant is represented before us. We have the satisfaction of knowing that everything that could be said in support of his case has been said, and well said.

Mr. Jellett's contention was that the effect of the Act of 1903 was to put the Land Commission in funds to make advances for the purchase of land; that the money advanced was the money of the Land Commission; and that the obligation to repay it is to the Land Commission, and not to the State. There are cases in which a corporation entrusted with the administration of money for public purposes has power to make advances by way of loan in a manner which would not create a debt to the Crown. But the cardinal distinction between such a case and the present is that here the Land Commission is merely a conduit-pipe for the purpose of conveying advances from the fund created by the statute for the purposes of land purchase. The advance is made by the State, not by the Land Commission.

Mr. Jellett examined the provisions of this statute in detail, but I can find nothing in it to alter the relation between the purchasing tenant and the State which existed under the former statutes. Under the 27th section advances are to be made by means of moneys, and not by guaranteed land stock, and a special fund out of which the moneys are to be advanced, called the "Irish Land Purchase Fund," is created. For the purpose of raising the money required for the Land Purchase Fund, a new capital guaranteed fund is created, and moneys raised by means of the stock are carried to the credit of the capital account of the purchase fund. The moneys so raised are the moneys of the

State, and the annuities received by the Land Commission from the purchasing tenants are applied by it in repayment of the obligations to the State incurred by the purchasing tenants, and for no other purpose. So far as they are concerned, the financial system of the statute is only a system of book-keeping, which does not affect the nature of their obligation to the State.

We were referred to two cases. In *The Attorney-General* v. *Howley* (1) it was held by the Court of Appeal that a loan to an occupier of land by the Commissioners of Public Works under the Land Law (Ireland) Act, 1881, and the Landed Property Improvement Acts, is a debt due to the Crown. The question there arose on the Statute of Limitations; and the considerations by which the Court of Appeal held that such an advance of public money constituted a Crown debt are applicable to the present case. *Wheeler* v. *Commissioners of Public Works* (2) has no application to a case like the present. It was there held that the St. Stephen's Green Act, 1877, had not the effect of constituting the Commissioners of Public Works servants of the Crown. There was no question in that case as to the effect of a grant of public money in creating a debt to the Crown.

Our direction to the officer is to mark judgment for the plaintiffs.

BOYD J.:—

I think it is perfectly clear that the Crown never lost touch with the money they advanced. All the work is done under the direction of the Treasury. The detailed work was committed to the Irish Land Commission as the agents of the Treasury. The Treasury never lost touch with the money.

KENNY J.:—

I adopt entirely the reasoning on which Madden J. has based the judgment of the Court.

(1) [1914] 1 I. R. 124. (2) [1903] 2 I. R. 202.

K. B. Div. 1914.

THE IRISH LAND COMMISSION *v.* O'NEILL.

The Court made the following order:—

The Court being of opinion that the sum claimed in the writ herein, namely the sum of £96 17*s.* 8*d.*, being two-half yearly instalments of an annuity of £96 17*s.* 8*d.*, payable by the defendant to the plaintiffs in respect of an advance made by the plaintiffs to the defendant under the provisions of the Land Purchase Acts, less by the sum of £38 received by the plaintiffs from the defendant subsequent to the issue of the said writ, is a debt due to the Crown, and that the Crown is not bound by the provisions of the Postponement of Payments Act, 1914, or the Proclamations thereunder, or by the Courts (Emergency Powers) Act, 1914, doth direct that the proper officer do enter up judgment for the amount due by the defendant to the plaintiffs.

Solicitor for the Irish Land Commission: *William Alexander.*
Solicitor for the defendant: *A. Clarke.*

A. E. C.

ALTON, APPELLANT; IRVINE, RESPONDENT (1).

K. B. Div. 1914–15.

Nov. 11, 1914
Jan. 21, 1915

Fisheries Acts—Licence to fish for Salmon with Single Rod—Having in Possession Two Rods in Fishing Order near Fishing Place—Fisheries (Ireland) Act, 1848 (11 & 12 *Vict. c.* 92), *s.* 29; *Fisheries (Ireland) Act*, 1869 (32 & 33 *Vict. c.* 92, *s.* 17.

Section 29 of the Fisheries (Ireland) Act, 1848 (11 & 12 Vict. c. 92), provides that any person using any engine (which includes a salmon rod), or having the same erected or in fishing order, or found with the same in his possession in or near any fishing place, or going to or returning from fishing, shall, on demand by one of certain specified persons, produce "the licence for the same." Section 17 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), enacts that every licence "to fish with single rod and line" shall have the name and address of the person to whom same shall be sold written thereon in clear and legible characters, and such licence shall not be transferred to or available for any person except the person named therein, and any person fishing with single rod and line, without a licence so to do, shall be subject to certain penalties.

A person found with two salmon rods in his possession, both erected in fishing order, near a fishing place, on demand made by the water bailiff for

(1) Before PALLES C.B. and GIBSON, MADDEN, BOYD, and DODD JJ.

the district, produced a licence in the prescribed form to fish for salmon with a single rod, but did not produce any second licence for a second rod, and had not, in fact, any such licence. He was prosecuted for having in his possession in or near a fishing place a salmon rod, and for having failed to produce a licence for the same.

Held by Palles C.B. and Gibson, Madden, and Dodd JJ., Boyd J. dissenting, that the licence required was a licence to the person to fish with any single rod and line, and not a licence for a particular rod and line, and that the only restriction on the respondent, who had a licence for one rod, was not to use more than one rod at the same time.

CASE STATED by a justice of King's County, under 21 & 22 Vict. c. 43.

At a petty sessions held at Banagher, on the 1st June, 1914, the respondent, Charles D'Arcy Irvine, was charged on summons with having in his possession in or near a fishing place, to wit, the river Shannon, a salmon rod, the same not being duly licensed, and with having failed to produce a licence for same, as required by statute.

The facts as proved or admitted were as follows:—The defendant, at the time of the offence charged, had in his possession two salmon rods—one a fly rod and the other a trolling rod—both erected in fishing order near a fishing place, viz., the New Cut on the river Shannon, and on demand made by the water bailiff for the district in which the said fishing place is situate, produced a licence to fish for salmon with a single rod in the prescribed form, but did not produce any second licence for a second rod, and had not, in fact, any such licence.

Being of opinion that the possession and production of only one such licence in the above state of facts was a sufficient compliance with s. 29 of 11 & 12 Vict. c. 92, and that the facts disclosed no offence within the meaning of that section, the justice dismissed the summons on the merits. On the requisition of the complainant he stated the present case. The question for the Court was whether he was right in law in his determination.

Price (with him *Denning K.C.*), for the appellant:—

We submit that under 11 & 12 Vict. c. 92, s. 29, there must be a licence for every salmon rod found in the possession of a

K. B. Div. 1914.

ALTON v. IRVINE.

person in or near any fishing place. Sect. 8 of that Act enacts that all engines, &c., used for the taking of salmon shall, before being used, be duly licensed. This shows that the licence is a licence for the engine or instrument and not to the person. The offence under section 29 is non-production of a licence for the rod or rods. There are three occasions on which failure to produce a licence constitutes an offence, viz.—(1) using any engine, net, or instrument, or device; (2) having the same erected, or in fishing order; (3) found in possession of the same in or near any fishing place, or going to or returning from fishing. A single salmon rod is an engine according to section 10, and the schedule to the Act; and there shall be "a separate licence" for "each separate engine": section 28. The stringency of section 29 is indicated by the words of the proviso thereto, but for which sellers and manufacturers of rods would be bound under a penalty to produce a licence for the same. A distinction has been drawn between using a rod without a licence, and failing to produce a licence for same when in a person's possession in or near any fishing place. The penalties for using any engine without a licence are, forfeiture of the engine, and not less than double, or more than treble, the licence duty payable: 11 & 12 Vict. c. 92, s. 22; 13 & 14 Vict. c. 88, s. 12; and persons fishing with a single rod and line without a licence are liable to these penalties: 32 & 33 Vict. c. 92, s. 17; while for having a rod in one's possession in or near a fishing place and failing to produce the licence for the same, the penalty is not less than the whole amount of the licence duty: 11 & 12 Vict. c. 92, ss. 28 and 29. Section 17 of 32 & 33 Vict. c. 92 makes the licence to fish with a single rod and line not transferable, so that, apparently, but for this section the licence under the earlier Acts would have been transferable. Although the rod is what is licensed, yet if anyone other than the person whose name and address appear in the licence uses it, he shall be subject to the same penalty as if he were an unlicensed person. A person with one licence using more than one rod at the same time is liable to the penalty imposed for using an unlicensed engine: *Combridge* v. *Harrison* (1). In that case

(1) 64 L. J. M. C. 175; 72 L. T. 592.

Cave J. said: "The licence is granted for the rod and line used, not in respect of the person who is using it. The respondent was using three rods and three lines, but had only one licence. He was therefore using two rods and lines without holding a licence for them." Substitute for the word "using," the words "having in possession," and that judgment completely supports our view. The prosecution in that case was for fishing without a licence; and in the English code there is no provision corresponding to section 29 of the Fisheries (Ireland) Act, 1848.

Hubert Hamilton and *W. G. Gibson K.C.* for the respondent:—

The defendant complied with 11 & 12 Vict. c. 92, as he produced a licence entitling him to fish with a single salmon rod. No doubt if he had been actually fishing with both rods at the same time he might have been liable to be prosecuted under section 17 of 32 & 33 Vict. c. 92, which in effect repeals, as we submit, section 12 of 13 & 14 Vict. c. 88, and section 22 of 11 & 12 Vict. c. 92; but that question does not arise in this case, in which the offence charged is violation of section 29 by failing to produce the requisite licence. This case challenges for the first time since the passing of 11 & 12 Vict. c. 92 (1848), the right of a fisherman licensed to fish with a single rod to bring with him a spare or alternative rod when he goes fishing. The appellant's argument necessarily rests upon the proposition that what is licensed is not the mere right to use *a* rod, but a particular identified rod, so that if a licensed person's rod broke the first day he used it, he could not replace it within that year without taking out another licence for the new rod. The sections of the Fisheries (Ireland) Act, 1848, which have been cited in support of this argument, are not inconsistent with the respondent's contention that the licence is personal to the individual whose name appears therein, and permits such individual to fish with any one single rod. The Fisheries Acts must be read and construed together: 32 & 33 Vict. c. 92, sect. 20. The following provisions appear to support directly the respondent's contention:—11 & 12 Vict. c. 92, s. 30, the concluding words of which are, "Provided always that if any person shall have paid a licence duty for a rod within any

K. B. Div. 1914.

ALTON v. IRVINE.

district as aforesaid, such person shall not be liable to pay an additional sum for licence in any other district by reason only of angling with a rod in any other district"; 13 & 14 Vict. c. 88, s. 12; and 32 & 33 Vict. c. 92, s. 17. If the licence the production of which is required by section 29 of the Act of 1848 is of the character contended for by the respondent, he has satisfied the conditions of that section by the production of the licence which the case stated finds as a fact he did produce, namely, "a licence to fish for salmon with a single rod, in the prescribed form."

An alternative view is that, since 32 & 33 Vict. c. 92, a rod fisherman incurs no penalty under section 29 of the Act of 1848 by non-production of his licence. For the purpose of this argument it must be assumed that prior to 32 & 33 Vict. c. 92, what was licensed was a specific rod. Following this assumption, it is submitted that the effect of section 17 of 32 & 33 Vict. c. 92, was to change the character of the licence, making it personal to the individual named therein, and entitling him to use a single rod and line. This necessitated the latter half of the section, but that applies only to a "person fishing with single rod and line, without the licence so to do," and leaves uncovered the case of a person merely failing to produce such licence.

Denning K.C. in reply:—

The provision in s. 17 of 32 & 33 Vict. c. 92, imposing a penalty, is only consistent with the instrument being licensed, because if the instrument is the thing licensed, there would, in the absence of that provision, be no penalty on the transferee of the licensee using the instrument. With regard to s. 30 of 11 & 12 Vict. c. 92, which provides that a person angling outside the district in which the licence has been issued shall not be guilty of an offence "only" on account of angling outside that district, that also contemplates that the instrument he is fishing with is the thing that must be licensed.

Cur. adv. vult.

Jan. 21, 1915.

PALLES C. B.:—

The question in this case is whether a person who, being licensed to fish with a single rod and line, has in his possession

two salmon rods in fishing order on the bank near a fishing place, is bound on demand under 11 & 12 Vict. c. 92, sect. 29, to produce licences for the two rods, or whether the licence for one rod is sufficient.

That section enacts that any person "using any such engine" (which includes a salmon rod), "or having the same erected or in fishing order . . . in or near any fishing place," shall produce on demand by one of certain specified persons "*the licence for the same*," under a penalty prescribed by section 28, not to be less than the whole amount of the licence duty, and not exceeding double the amount of the same.

What is the meaning of "the licence for the same" where it occurs in the section? This depends upon the construction of provisions in three different Acts (11 & 12 Vict. c. 92, 13 & 14 Vict. c. 88, and 32 & 33 Vict. c. 92), all of which, save where inconsistent, are to be construed together.

The duty for a salmon rod is imposed by sect 8 of 11 & 12 Vict. c. 92, which enacts that every engine for the taking of salmon shall "before the same be used" be duly licensed "upon payment of the licence duty . . . hereinafter provided." The 13th section provides for the fixing of the amount of the licence duties, which are not to exceed the amounts stated in the schedule to the Act. The schedule is headed, "Scale of licence duties for each engine . . . used in Salmon . . . Fisheries." For a single rod the amount prescribed is £1. Sect. 22 enacts "that if any person shall use or erect any engine . . . subjected to licence duty, as aforesaid, for the taking of salmon . . . without the same being duly licensed," the same shall be forfeited, and the person using the same shall be liable to pay such penalty, not less than half nor exceeding the whole of the licence duty which the engine under the Act is subject to. By sect. 28 the licences are to be in the form the Commissioners of Public Works shall prescribe. A separate licence is to be issued for each separate engine, and it is provided that the licence shall be good and valid only for the year, district, and purpose for which the same shall be issued, and that any party using or presenting the same for any other district or purpose, or in any manner altering or fraudulently counterfeiting the same, shall be liable to a penalty not less than the whole

K. B. Div. 1915.

ALTON v. IRVINE.

Palles C.B.

amount of the licence duty, and not exceeding double the amount of same. And sect. 30 enacts that any person who has paid a licence duty for a rod within any district shall not be liable to pay an additional sum for a licence in any other district by reason only of angling with *a* rod in any other district.

The question principally argued was whether the licence was one to the person to use any rod answering the description of a "single salmon rod," or a licence for the use of the particular rod.

It is unnecessary to decide how the case would have stood if it depended on this statute of 11 & 12 Vict. c. 92 alone, without any interpretative context in subsequent legislation; because both the subsequent Acts supply this interpretative context. By the 12th section of the second Act (13 & 14 Vict. c. 88) it is enacted that "any persons using or erecting any engine . . . without being duly licensed under the provisions of the before-recited Act of the twelfth year of Her Majesty, or this Act, shall be liable to pay such penalty, not less than double nor more than treble the licence duty" which the engine used would for the time being be subject to "under the said Act or this Act," in addition to the forfeiture of the engine, "anything in the said recited Act to the contrary notwithstanding." In this section the words "without being duly licensed" plainly apply to the person using the engine, not to the engine itself; and, as it treats such user as unlawful under the previous Act, it shows that the licence under the previous Act was a licence to a person, not a licence of the engine.

The third Act is the 32 & 33 Vict. c. 92, which, by section 20, is to be construed as one Act with, *inter alia*, the two former Acts I have mentioned. It, by its 17th section, enacts that "every licence to fish with single rod and line shall have the name and address of the person to whom the same shall be sold written thereon in clear and legible characters, and such licence shall not be transferred to or available for any person except the person named therein"; and any person fishing with single rod and line without *a licence so to do*, i.e., without a licence to the person, shall be subject to the same penalty as is imposed by the 13 & 14 Vict. c. 88, upon persons using any engine without being duly licensed.

I am of opinion that the alteration effected by this section rendered the 13 & 14 Vict. c. 88, s. 12, inapplicable thenceforth to fishing with single rod and line, and as the effect of section 12 of the 13 & 14 Vict. c. 92, was to repeal section 22 of the first Act, thenceforth this 17th section was the only section which rendered illegal unlicensed fishing with single rod and line. This, then, is the section, and not those of the Act of 1848, so much relied on, which we have to construe to determine the effect of the licence; and, in my opinion, the words in it "fish with single rod and line" plainly point, not to *a particular* single rod and line, but to *any* single rod or line.

Taking the legislation as a whole, I think it impossible to arrive at any other conclusion; and I am, therefore, of opinion that the only restriction on the respondent here, who had a licence for one rod, was not to use both rods at the same time, and that the words in the 29th section of the Act 11 & 12 Vict. c. 92, "shall produce . . . the licence for the same," having regard to the subsequent legislation, are satisfied as to a person rod-fishing from the bank by the production, by the person fishing, of a licence to him for a single rod and line.

Fishing, however, with two rods at the same time, as is possible for one in a boat, requires two licences.

The decision of the justices was right, and must be affirmed with costs.

GIBSON, MADDEN, and DODD JJ. concurred.

BOYD J.:—

This case comes before us as a case stated by Arthur H. Burdett, J.P. From the case it appears that the facts, as proved or admitted, were as follows:—

The defendant, at the time of the offence charged, had in his possession two salmon-rods (one a fly-rod and the other a trolling rod), both erected in fishing order near a fishing place, viz., the New Cut on the River Shannon, and, on demand made by the water-bailiff for the district in which the said fishing place is situate, produced a licence to fish for salmon with a single rod in the prescribed form, but did not produce any second licence for a

K. B. Div. 1915.

ALTON v. IRVINE.

Boyd J.

a second rod, and had not, in fact, any such licence. The said magistrate decided that the possession and production of such single licence, in the above state of facts, was a sufficient compliance with sect. 29 of 11 & 12 Vict. c. 92, and that the said facts disclosed no offence within the meaning of the said section. He dismissed the summons on the merits, with costs and expenses.

I am of opinion that the magistrate was wrong in so deciding, and that he should have convicted the defendant. Numerous Acts have been passed for the purpose of preserving and improving the salmon fisheries of Ireland, and amongst others the statute 11 & 12 Vict. c. 92. In the preamble of this statute it recites that it is expedient that funds should be provided for defraying the cost of such additional protection as is provided in the said Act, and that it is "just and right that the same should be levied from the persons for the time being using any engine or device whatsoever for the capture of such fish"; and, by sect. 8, it enacts that "*all engines, nets, instruments, or devices whatsoever used for* the taking of salmon, trout, pollen, or fish of the salmon and trout kind . . . shall . . . *before* the same *be used* in the said year or any subsequent year, be duly licensed and rated in the manner hereinafter prescribed, upon payment of the licence duty or rate, as the case may be, hereinafter provided."

In this section a distinction is clearly drawn as to the meaning of the word "used." In the former part of the section it provides as to the character of the instrument ordinarily used for the taking of salmon, and in the latter portion it provides that *before* such instrument be actually used it must be licensed and rated. The owner of *all* and *every* such devices is liable to be taxed and rated before he can legally use the same. The amount of licence duty for *each* such instrument is specified in the schedule to the Act, which fixes the duty payable on *each* salmon rod at £1.

Section 21 provides for the licence duty payable for any instrument not mentioned in the schedule "which *may be proposed to be used* for fishing for salmon," which would seem to imply that the *proposal to use* any such instrument would subject the proprietor of it to the payment of the duty before its actual use, and must be read in conjunction with the provisions as to the scheduled

instruments mentioned in sect. 8. The conservators have no discretion as to the character or legality of the instrument, but only as to the amount of the duty payable for its use.

By sect. 22 it is enacted that if any person shall *use or erect* any instrument whatsoever subject to licence duty, "*or by any means fish*" within any salmon, &c., fishery within the year without the same being duly licensed, *every* such instrument shall be forfeited. It is to be observed that this section does not require the insertion of the name or address of the person to whom the licence is issued. This is now required under sect. 17 of 32 & 33 Vict. c. 92. The form of the licence required by the foregoing sections has been fixed by sect. 17 of the statute 32 & 33 Vict. c. 92, and that issued in the district applicable to this case has been furnished to this Court, and a licence for *a single salmon rod* for 1914 was issued to the defendant named therein, and states his address and the sum paid for the licence.

By the schedule to the Act the licence duty payable in respect of *each* single rod used in a salmon district is fixed at £1, and this was the sum paid by the defendant for his licence, and therefore he had no legal right to use, or propose to use, any device but a single salmon rod for fishing. There is no identification of the rod authorized to be used by a licensee, and, accordingly, if the rod he was in the habit of using were broken or discarded by him there would be nothing to prevent his using some other rod in its place. I think this follows from the sections to which I have referred. But sect. 29 manifestly was passed for the purpose of preventing fishermen from evading their liability to pay for *each* separate instrument which they should have erected, or in fishing order, or which should be found in their possession, in or near any fishing place, or going to or returning from fishing. In such circumstances they shall, when demanded by the officer of the conservators, produce the licence *for the same*. In the present case the magistrate expressly finds that the defendant on the occasion complained of "had in his possession the two salmon rods (one a fly-rod and the other a trolling-rod), both erected in fishing order near a fishing place, viz., the New Cut on the river Shannon." Therefore he brought himself within the provisions of the said 29th sect. The section does not confine the offence to the actual

K. B. Div. 1915. ALTON v. IRVINE. Boyd J.

using of the instrument, but expressly extends the offence to "*or* having the same erected, *or* in fishing order, *or* found with the same in his possession in or near any fishing place, *or* going to or returning from fishing."

The defendant contends that as he could only use one rod at a time, the production of the licence for a single salmon rod was sufficient to cover both rods which were found in his possession.

In my opinion this contention is not correct, and affords no legal defence. The schedule to the Act provides a scale of the licence duties for *each* instrument and device *used* in salmon fisheries. The word "used" in the schedule clearly means commonly used, or proposed to be used, and does not refer to its actual use, and has the same meaning as the similar word in the 8th, 10th, and 22nd sects. The 28th sect. expressly provides that "a separate licence shall be issued for each separate engine, net, instrument, or device for taking fish," and does not mention the word *used*. The defendant, by having his two rods fitted up and erected in fishing order in his possession, and near a fishing place, was, in my opinion, bound to have a separate licence for each of the said rods. I am also of opinion that the proviso contained in the 29th sect., exempting manufacturers or sellers of fishing instruments, makes this perfectly plain, as it enables such people to prove that they have them in their possession "not for the purpose of using the same." In the present case the defendant manifestly had the rods fitted up for the purpose of using same.

It has been stated in the argument on behalf of the defendant that fishermen usually provide themselves with a number of rods when they go on a fishing expedition. But I think sect. 29 protects them against the necessity of producing a licence except for such rods as they may be using, or have erected in fishing order, or in their possession *in or near a fishing place*.

In the case of *Moses* v. *Raywood*(1) it was decided that a man having in a boat a net or device for catching salmon, and being found in a salmon fishing place without a licence for the same, was guilty of the offence of *using* the net, though it was not in fact put into the water.

In the English Fishery Acts there is no section at all similar

(1) [1911] 2 K. B. 271.

to sect. 29 of the Irish Act 11 & 12 Vict. c. 92, and, in my opinion, it was enacted for the express purpose of preventing any evasion of the liability to pay the licence duty on each instrument in the possession of the owner thereof "in or near any fishing place." The section clearly does not prohibit the owner of the instrument having as many rods as he may like to have with him on a fishing expedition, provided he does not bring them "in or near a fishing place." Accordingly, if he breaks a rod he can supply himself with another from his place of abode, and use it on his licence for "a rod."

That a man can actually use more rods than one at the same time is clear from the facts mentioned in the case of *Combridge* v. *Harrison* (1). In that case the defendant was actually using three rods. It is a well-known practice for a man to fasten a trolling rod into the bank of a stream or river, or otherwise fix the same, and to fish with it at the same time that he is casting a fly with another rod. In a boat three rods can be used at the same time—one at each side of the boat for trolling, and the third for fly-fishing over the stern.

Section 29 applies to every class of salmon-fishing instruments whatsoever, and is not confined to rod-fishing, and it provides a penalty for persons (1) *using* any such instrument, *or* (2) having same erected or in fishing order, *or* (3) found with the same in their possession, in or near any fishing place, *or* (4) going to or returning from fishing, in the event of their not producing a licence for the same. It is expressly not confined to the use of the instrument. Supposing a man had erected at or near any fishing place a number of similar devices such as those mentioned in the 28th section, and only obtained a licence for one with the name of *the engine* (as provided by sect. 28) for which the *same* shall be issued, could it be contended that he would be exempted from the necessity of obtaining any licence for the other similar engines so long as he only used one at a time. I think not. The licence must be issued *before* the use of the engine, and it can only be issued by the person duly authorized to sell the same. He could not, therefore, when at the fishing place, obtain an additional licence.

(1) 64 L. J. M. C. 175; 72 L. T. (N. S.) 592.

K. B. Div. 1915.

ALTON v. IRVINE.

Boyd J.

The licence provided for under sect. 8 of 11 & 12 Vict. c. 92, did not state the name of the licensee, and, therefore, it was possible for any person who had the same in his possession to allege that he was the licensee. There was no express provision preventing a transfer of such licence arising from the wording of sect. 8 of the Act just mentioned, which states that all engines shall be licensed before they are used, and sect. 12 of 13 & 14 Vict. c. 88, which imposes the penalty on the users of unlicensed engines. To remove any doubts sect. 17 of 32 & 33 Vict. c. 92, was passed. Prior to the passing of this statute, as I have before stated, the name and address of the licensee were not mentioned in the licence, and I have no doubt that it may have been contended that it was the rod, and not the person owning the rod, which was licensed, and that anyone could use the rod if he produced a licence for a rod. To remove all difficulty as to the intention of the Legislature, this section was inserted, and it provides that the name and address of the licensed party shall be written on the licence "in clear and legible characters," and that "such licence shall not be transferred to, or available for, any person *except the person named therein*; and any person *fishing* with single rod and line without the licence *so to do* shall be subject to the *same penalty* as is imposed by sect. 12 of the Act passed in the thirteenth and fourteenth years of the reign of her present Majesty, c. 88, upon persons *using* any engine, net, instrument, or device without being duly licensed."

Schedule A of 32 & 33 Vict. c. 92 incorporates, amongst several other Acts, 11 & 12 Vict. c. 92, and does not in any way alter, annul, or qualify the provisions of sect. 29 of the last-named Act, to which I have before referred.

I am, therefore, of opinion that the magistrate should have convicted the defendant.

Solicitor for the appellant: *R. F. Barry.*

Solicitor for the respondent: *R. J. Fetherstonhaugh.*

C. L.

THE BALLYMAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LIMITED, APPLICANTS; THE COUNTY COUNCILS OF CAVAN AND LEITRIM, RESPONDENTS (1).

Appeal. 1914. Dec. 3, 4, 18.

Local Government—Criminal Injuries—Compensation—Malicious Burning of Property—Owners insured against Loss by Fire—Right of Owners to recover off County—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 135—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37) *s.* 5.

Upon an application under the Grand Jury (Ireland) Act, 1836, sect. 135, and the Local Government (Ireland) Act, 1898, sect. 5, for compensation for damage caused by the malicious burning and destroying of certain premises, the fact that such premises were insured against fire cannot be taken into consideration when assessing the amount of compensation to be recovered off the county by the owner of the premises.

CASE STATED for the Court of Appeal by Lord Justice Holmes, as judge of assize in county Cavan, at the Summer Assizes, 1914, on the hearing of an appeal from the county court judge under the Local Government (Ireland) Act, 1898, sect. 5.

The facts of the case were set forth in the case stated as follows:—

"The application was for the sum of £400 as compensation for that some person or persons on the night of the 23rd March, 1914, or early in the following morning, did maliciously set on fire, burn, and destroy the Ballymagauran creamery; and the appeal to me was from a decree that the applicants were entitled to be paid the sum of £100 as compensation for the injuries complained of, £75 of which, with £7 1*s.* 4*d.* costs and expenses, were to be paid by the county council of Cavan, and £25 of which, with £2 7*s.* 2*d.* costs and expenses, were to be paid by county Leitrim.

"From this decree both the applicants and respondents appealed.

(1) Before O'BRIEN L.C., PALLES C.B., and MORIARTY L.J.

Appeal.
1914.

BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY *v.* CO. COUNCILS OF CAVAN AND LEITRIM.

"After hearing evidence and counsel I formed the opinion that the burning was malicious, but that, assuming the applicants were entitled to compensation, the sum of £100 was too high, and ought to be reduced to £70. Furthermore, it appeared in the course of the hearing that the applicants, as owners of the premises described in the application, hold a policy or covering note against fire, dated the 14th day of March, 1914, from the Commercial Union Assurance Co., Ltd. This document was not produced, but it was admitted by counsel for the applicants that the property described in the application is assured against damage by fire to a sum far in excess of £100—I think the amount is £400—and that the instrument of assurance contains no clause or stipulation relieving the insurers in the case of loss by incendiarism, or imposing on the insured the obligation of seeking to recover compensation from the county for malicious injury. It was admitted that the insurance company was thoroughly solvent. I called attention to this, and said that it would be curious if a company which had received a premium for indemnifying the applicants against loss by fire should be relieved from its obligations by enforcing compensation from the rate-payers. I therefore adjourned the further hearing of the appeal to the following morning, so that counsel might refer me to the provisions of the statute, and authorities, if any existed. They were able to give little or no assistance. Mr. Justice Andrews had decided that the insurance company was not authorized by the statute to claim compensation in its own name, and this decision seems to have since been followed; but the point that the applicant was insured seems never to have been raised or argued, except that on one occasion Lord O'Brien, prior to the passing of the Act of 1898, ruled that the owner of the property was entitled to recover under the Grand Jury Acts, although he had been paid the money for which it was insured.

"On my intimating that I would feel myself obliged to dismiss the application, I was asked by the applicants to state a case, which I consented to do on the admission relating to the insurance made by the applicants' counsel, which I have set forth herein.

"The question reserved is whether, notwithstanding the

insurance, the applicants are entitled to succeed in their application.

"If the reply is in the affirmative, the sum to be paid as compensation shall be reduced to £70, of which the sum of £52 10*s.* is to be paid by the County Cavan, and £17 10*s.* by County Leitrim, and, as both parties appealed, no order as to costs.

"If the reply is in the negative, the decree shall be reversed, with £2 10*s.* costs below, and £9 14*s.* costs of appeal."

Dickie K.C. (with him *Wood*), for the Ballymagauran Creamery Company:—

The fact that an owner of premises which are maliciously burned has paid insurance premiums in respect of them cannot deprive him of his right to recover compensation off the county, where, apart from the insurance, such right would be unquestionable. If the insurance could be taken into account, it would mean that there must be an inquiry in every case to ascertain whether the insurance fully covered the loss. The words of the section show that the right of the owner is absolute, and not dependent on any question of insurance. Sect. 135 of 6 & 7 Will. 4, c. 116, provides that "in all cases of maliciously . . . burning or destroying any house, outhouse, or other building . . . the said grand jury shall, on the consideration of the said matter, either disallow such application altogether, or present such sums of money as the person or persons so injured ought to receive for such injury or damage." The words "person or persons injured" mean the persons whose property has been maliciously injured, as between them and the county. They "ought to receive" such sum as the grand jury find represents the amount of damage to the property. If any person damages the property of another, the owner, whether insured or not, could sustain an action against the wrongdoer to recover the amount of the damage; and it is submitted the present case is exactly on the same footing. Fire insurance is merely an indemnity or suretyship, and an insured owner of property which has been unlawfully burned by another may bring an action against the wrongdoer to recover

Appeal. 1914.

BALLYMAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY v. CO. COUNCILS OF CAVAN AND LEITRIM.

the amount of the damage, notwithstanding that he has been paid by the insurance company, though he would be obliged to pay over to the company any sums recovered in such action. The precise point in this case was raised in *Jones* v. *Corporation of Belfast* (1); and Lord O'Brien L.C.J. decided that the fact that the applicant was insured did not relieve the corporation from their liability to pay. No reasons are given in the judgment, and the opposite view appears to have been regarded as unarguable. The policy of the Act supports the contention on behalf of the owner. It was to make the inhabitants of the county diligent in discovering persons who committed the wrongs dealt with in the Act, and in bringing the offenders to justice; and it did this by making the county liable where the offenders were not discovered.

[He referred to *Phœnix Assurance Co.* v. *Spooner* (2); and *Assicurazioni Generali de Trieste* v. *Empress Assurance Corporation, Limited* (3).]

Henry K.C. and *Wylie K.C.* (with them *Murnaghan*), for the county councils:—

What the person injured ought to recover is the actual loss he has sustained. The words of sect. 106 of the Act should be compared with the section in question here. Section 106 provides that compensation shall be paid by the county where peace officers have been maimed or murdered in the execution of their duty, and proceeds:—"It shall and may be lawful to and for the grand jury of the county within which such murder or maiming shall have been committed respectively to present such sum or sums of money as they shall think just and reasonable to be paid to the personal representative of such . . . peace officer." There is no difference between "just and reasonable" in that section, and "ought" in the section applicable to this case. The fair and reasonable sum is the sum that compensates his actual loss. In neither of these two sections is there any indication of obliging full compensation to be given, and of making the Court merely the machinery for ascertaining the amount of damage that has

(1) 32 I. L. T. R. 32.
(2) [1905] 2 K. B. 753.
(3) [1907] 2 K. B. 814.

been sustained: *Re Serjeant Nolan* (1); *English* v. *Co. Council of Kerry* (2). The limiting words "ought" and "fair and reasonable" have practically the same effect as the words in Lord Campbell's Act (9 & 10 Vict. c. 93), sect. 2, "injury resulting from such death," and before the Act of 1908 the amount of an accident policy was applied in reduction of the compensation awarded under that Act. It was decided by the Privy Council in *Grand Trunk Railway Co. of Canada* v. *Jennings* (3) that compensation under that Act was restricted to the actual pecuniary loss sustained by the plaintiff. In the older Acts relating to compensation the words were different. In 7 Wm. 3, c. 21 (Irish), the words in the preamble were—"shall make full amends." Similar terms were contained in 19 & 20 Geo. 3, c. 37 (Irish), which was the statute in force prior to the Grand Jury Act, 1836; and in the English Act, 7 & 8 Geo. 4, the Act in force prior to the Riot Act, 1886. The words were "full compensation." Before the Grand Jury Act, 1836, the application for compensation in a case like the present was by action, in which the ratepayers were in the position of trespassers, and the compensation was not limited to actual loss; but the present procedure is quite different, the ratepayers are no longer in the position of trespassers. This fact, coupled with the use of the word "ought," shows that the liability of the ratepayers is limited to the pecuniary loss sustained by the applicant. It is for this reason *Mason* v. *Sainsbury* (4) does not apply; if the county councils were in the position of trespassers, that case would be an authority against them. In *Yates* v. *White* (5) the action was one of trespass on the case, and all the judges based their decision on the ground that the wrongdoer could not take any benefit out of the insurance. [They referred to *Midland Assurance Co.* v. *Smith and Wife* (6), and *Laffan* v. *Cashel Urban District Council* (7).]

Dickie K.C. in reply:—

The right to the insurance money arises entirely out of the contract contained in the policy. The county councils have no

(1) 24 I. L. T. and S. J. 623.
(2) 34 I. L. T. R. 76.
(3) 13 A. C. 800.
(4) 3 Dougl. 61.
(5) 4 Bing. N. C. 272.
(6) 6 Q. B. D. 561.
(7) 35 I. L. T. R. 203.

Appeal. 1914.

BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY *v.* CO. COUNCILS OF CAVAN AND LEITRIM.

Dec. 18.

interest in the policy, and the policy in fact could not be before the judge of assize upon an application for compensation for the criminal injury.

[He referred to *Bradburn* v. *Great Western Railway Co.* (1); *Witham* v. *Hill and Others* (2); *Simpson* v. *Thompson* (3); *English* v. *County Council of Kerry* (4).]

Cur. adv. vult.

O'BRIEN L.C.:—

The question involved in the present appeal is undoubtedly one of great practical importance. It arises on a case stated by Lord Justice Holmes sitting as judge of assize in respect of a claim for malicious injury. The counties immediately interested are Cavan and Leitrim, but the decision will affect every county in Ireland, hence the necessity of very careful consideration of every point that has been raised in the course of the arguments.

The claimants were the proprietors of the Ballymagauran creamery, whose premises were maliciously destroyed by fire on the 23rd March, 1914.

The learned Lord Justice found that they would be entitled to compensation from the two counties in the sum of £70, apportioned between them at the rate of £52 10*s.* to one, and £17 10*s.* to the other, subject to the legal question raised, which, if decided in their favour, would relieve them from all liability.

It appears that the appellants were insured under a policy which contained no clause or stipulation relieving the insurers from liability in the case of loss by malicious burning. It was admitted that the insurance company was quite solvent.

The judge was of opinion, to use his own language, that "it would be curious if a company which had received a premium for indemnifying the applicants against loss by fire should be relieved from its obligations by enforcing compensation from the ratepayers," and he intimated that he would feel himself obliged to dismiss the application, but being asked by the applicants to state a case he consented to do so, and stated the present case for the opinion of this Court.

(1) L. R. 10 Ex. 1.
(2) 2 Wils. 91.
(3) 3 A. C. 279.
(4) 34 I. L. T. R. 76.

No question was raised as to the liability of the insurance company to pay, and the case is free from any practical difficulty caused by any considerations of this kind.

The terse manner in which Lord Justice Holmes put his view goes to the root of the problem to be solved. The only case in which the matter previously arose, so far as we know, was one before Lord O'Brien C.J., sitting as judge of assize in Belfast, where he held that the actual payment of the insurance did not prevent recovery of compensation under the section: *Jones* v. *Belfast Corporation* (1). The report does not show, however, that the case was argued very keenly, nor does the Lord Chief Justice give any reason for his opinion, but it undoubtedly represents the view which was held by the Bench and Bar largely during the many years the statute was in force, although the contrary opinion expressed by Lord Justice Holmes, and which must be dealt with in the present case, was frequently mooted.

It is singular that it only comes up for considered decision after so many years; but I do not think that any inference can be fairly drawn one way or the other from this.

Passing for the moment from the important question raised by Mr. Henry on behalf of the counties as to the technical effect of the words of sect. 135, one matter stands out clearly, namely, that the Legislature, for reasons which we must assume to be right, has thought fit to cast upon absolutely innocent ratepayers the liability to make good damage sustained by one of them arising from the criminal act of persons for whose conduct no one of these ratepayers is in any sense morally responsible. It is not that the baronies or counties are insurers of property maliciously destroyed in their district; but although they are not placed in the position of trespassers, as was done by earlier statutes, they are made liable in a statutory procedure to compensate for the loss inflicted on innocent owners of property by the acts of wrongdoers. Whether the counties could themselves insure against a liability of this kind need not be considered, but it certainly seems to me that they cannot be deemed as, directly in any event, having an interest in a policy of assurance which a ratepayer for his own additional protection may take out; and,

(1) 32 I. L. T. R. 32.

Appeal. 1914.

BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY v. CO. COUNCILS OF CAVAN AND LEITRIM.

O'Brien L.C.

speaking with all respect, it does not occur to me that the act of the insurance company in endeavouring to obtain compensation from the county in the name of the injured person can be looked at as a relieving of the insurance company from its obligations. The obligation of the county is a direct primary liability to the person injured; the obligation of the company one of indemnity, not to the community but to the individual; and to my mind at any rate the problem presents itself rather in this form, that it would be singular if the prudent act of the ratepayer in insuring for his own benefit was to relieve the county from the primary obligation which is placed upon it to pay compensation.

The practice of insuring, in cities at any rate, property against loss caused by malicious injury, be it fire or any other wanton or unlawful method of destruction, is now very general; and if the view which is presented to us by the counties in this case is correct in law, the result would be that the large body of property owners insuring against malicious damage would really be only insuring in the interest of others who are in no sense in privity with the contract of insurance at the time it is made.

It appears to me that the liability is primarily on the county, and not primarily on the insurance company. If it were primarily on the insurance company, then, of course, there would be great force on broad grounds of justice in the contention of the county.

While this represents to my mind the general position of affairs, it does not follow that Mr. Henry's argument is wrong; but if it be the true light in which to approach the section, one must be on one's guard against a contention that prima facie seems erroneous.

Put shortly, the argument is that as compensation for loss is the basis of the section, the person injured cannot receive more than compensation for the loss, but that he ought not to receive anything if he could be, or has been, compensated from some other source, in this case the policy of insurance. Mr. Henry, for the appellants, admits that under the law as it stood before 1836, when the proceeding was by action, the question of the existence of the policy could not be taken into consideration, but he says that the abolition of the action, which was based on the fiction that the

innocent ratepayers were in the shoes of the trespassers, coupled with the peculiar words of the section, makes a cardinal difference.

Of course it is not a question of the ratepayer ultimately getting paid twice over, and—as in the case of *Mason* v. *Sainsbury* (1), to which I will afterwards more fully refer, and in other cases—the proceedings are taken in the name of the insured person, but ultimately the money if recovered will go in ease of the insurers, whose contract is only a contract of indemnity.

The first important case which was relied on is *Mason* v. *Sainsbury* (1). That was a proceeding, in the name of the person whose property had been destroyed, to recover compensation under 1 Geo. 1, c. 5, sect. 6. The insurance company having already paid compensation on their insurance, the proceeding of course was one taken for the benefit of the company. It was held that the existence of the policy could not be taken into consideration in assessing compensation; but this distinction is sought to be drawn by counsel, that it cannot be an authority where the proceeding is founded, not on the basis of an action for trespass, where the amount of compensation may conceivably be larger than the damage to the property, but on statutory proceedings where mere compensation for the injury or damage is to be given, limited by the qualifying words "ought to receive."

Now although a great deal of the argument at the Bar, and some of the reasons given for the decision, dealt with the proceeding as one placing the hundred for civil purposes in the place of the trespassers, the principle of the case is not, when we come to deal with subsequent developments, necessarily limited to cases of actions involving trespass as their foundation.

The county is not placed in the position of a trespasser —no doubt all the money which could be recovered from a trespasser cannot be recovered from it—but the right arises by reason of a trespass having been committed, a wrongful act involving the destruction of the property, and to the extent of some compensation the county, in lieu of the wrongdoer, is made liable. Their liability is not so extensive as the liability of the wrongdoer, but it covers some of the liability, a liability which

(1) 3 Dougl. 61.

Appeal. 1914.

BALLYMAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY v. CO. COUNCILS OF CAVAN AND LEITRIM.

O'Brien L.C.

could not come into existence but for the wrongful act by reason of which innocent persons are made legally accountable in damages. When the old action was abolished by section 139, and the new proceedings, equally based on the doing of a wrongful act and compensation by innocent persons were substituted, I should have thought, apart from authority, that so far from there being a different principle involved, the principle would be the same, although the amount to be recovered might probably be less.

In point of fact a reference to another case which is in the same volume of Douglas' reports, the *London Assurance Company* v. *Sainsbury* (1), shows that in assessing damages under the statute of George 1, the juries assessed on the basis of actual loss and nothing else; that, however, though useful to be noted, does not settle the law.

The next case to be referred to is the case of *Clarke* v. *The Inhabitants of the Hundred of Blything* (2). This was a case of malicious burning under 9 Geo. 1, c. 22, s. 7, which requires that the hundred shall make satisfaction and amends to every person for the damage that he shall have sustained by the setting fire to any stack by any offender against that Act. *Mason* v. *Sainsbury* (3) was applied in that case, and without any such distinction as is sought to be made in the present instance, but it is only fair to say that the *Blything Case* was decided only on a note of *Mason* v. *Sainsbury* (3), and not on the judgment as reported in Douglas; but the arguments of counsel on behalf of the defendants were the same as the arguments here, although the words of the section are different. Abbott C. J. had no doubt about what the decision should be. In that case the Chief Justice referred to the policy of the law, the object of which was to aid in the bringing of offenders to justice, and we can see the same policy in the latter part of section 137 of the Grand Jury Act.

The next case, which is nearly always cited in connexion with *Mason* v. *Sainsbury* (3), and which has received approval from the House of Lords in *Simpson* v. *Thompson* (4), is the case

(1) 3 Dougl. 245.
(2) 2 B. & C. 254.
(3) 3 Dougl. 61.
(4) 3 A. C. 279.

of *Yates* v. *Whyte* (1). In that case, speaking of *Mason* v. *Sainsbury* (2), Chief Justice Tindal treats the case simply as one establishing that recovery upon contract with the insurers is no bar to a claim for damages against a wrongdoer, quoting Lord Mansfield in *Mason* v. *Sainsbury* (2), "Though the office paid without suit, this must be considered as without prejudice; and it is, to all intents, as if it had never been paid. The question comes to this: Can the owner of the house, having insured it, come against the hundred under this Act? Who is first liable? If the hundred be first liable, still it makes no difference. If the insurers be first liable, then payment by them is satisfaction, and the hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an *indemnity*." Mr. Justice Vaughan says: "We every day see the insured put in the place of the insurer. And in *Clarke* v. *The Hundred of Blything* (3), the authority of *Mason* v. *Sainsbury* (2) was expressly recognised by Lord Tenterden."

Mr. Justice Vaughan, quoting *Mason* v. *Sainsbury* (2), omits the latter part of Lord Mansfield's judgment, in which he mentions the fact that the Act put the hundred in the place of the trespassers; but it is clear to my mind that he treats it as a case simply where the insurer, after he has discharged his liability on his contract of indemnity, stands in the place of the insured. As I have said already, the statute may not give to the insurer all the remedies that would be given against the trespassers, but it does to some extent cast the liability arising from the trespass on a person who is not a trespasser, and the form of the proceeding cannot obscure the substance. The learned judge brackets with *Mason* v. *Sainsbury* (2) the case of *Randal* v. *Cockran* (4), which was merely a case of placing the insurers in the position of the insured with regard to the proceeds of certain captures made under letters of reprisal.

Once we look at it from the point of view of a primary liability on the county, and only a contract of indemnity with the person who suffers damage, there does not seem to me to be any real difficulty in the case.

(1) 4 Bing. N. C. 272.
(2) 3 Dougl. 61.
(3) 2 B. & C. 254.
(4) 1 Ves. Sen. 98.

Appeal.
1914.

BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY *v.* CO. COUNCILS OF CAVAN AND LEITRIM.

O'Brien L.C.

Lord Blackburn in the case of *Simpson* v. *Thompson* (1), speaking of *Mason* v. *Sainsbury* (2), says (p. 293): "The right of the underwriters could not arise in those cases by relation back to the passing of the property at the time of the loss, for there was no such passing of the property. It could only arise, and did only arise, from the fact that underwriters had paid an indemnity, and so were subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity." This seems to me to place *Mason* v. *Sainsbury* (2) and *Yates* v. *Whyte* (3), as laying down a general proposition not controlled by the extent to which damages could be recovered from the innocent party in respect of the wrongful act, nor by the form of procedure.

On the assumption that the cases of *Mason* v. *Sainsbury* (2) and *Yates* v. *Whyte* (3) did not proceed upon the narrow ground suggested at the Bar, of course they, and all cases following them, are clear authority in favour of the view which was taken by the Lord Chief Justice in *Jones* v. *Belfast Corporation* (4). The fact that the insurance company clearly cannot make a claim under the Grand Jury Act in their own name, does not seem to me to help the contention of the county.

If the case is looked at from the point of view that I think it must be, the word "ought" in the section cannot have the force or be read in the sense contended for. Whether he is insured or whether he is not insured, it appears to me that the person injured ought to receive such compensation as is reasonable in respect of the damage done to the property, and whether he can put it in his own pocket or whether, arising from other principles of law, he must pay it to the insurance company, it is none the less a sum which he ought to receive, being the person injured.

I do not think that we get any help whatsoever from sect. 106, and I am not at all to be taken as assenting to the proposition which was thrown out at the Bar that the amount of an accident policy should be taken into consideration on a claim under that section. I express no opinion on it, though I certainly have one.

(1) 3 A. C. 279.
(2) 3 Dougl. 61.
(3) 4 Bing. N. C. 272.
(4) 32 I. L. T. R. 32.

It is better to take section 135, as it must be taken, in conjunction with sections 137, 139 and 140, and construe it accordingly.

Cases under Lord Campbell's Act were strongly pressed on us. The Legislature has deemed it right to abolish with regard to insurance the distinction drawn as to compensation in the case where the plaintiff was maimed for life, and useless for work, and the case where the accident caused death. The Grand Jury Act, in the way I regard it, has a public policy behind it, one quite different from that which underlies Lord Campbell's Act, and I should be violating that policy if I applied those cases to the Grand Jury Act.

PALLES C.B.:—

The enactment, upon the construction of which the determination of this appeal depends, was passed nearly eighty years ago. During that long period there is no report of any case, save one, in which this question was raised, viz. *Jones* v. *Corporation of Belfast* (1), and in that case the question appears to have been decided as if it were unarguable, no reasons having been given by the Lord Chief Justice for his judgment. The general opinion of the profession, for the last fifty or sixty years at least, was that the primary liability for a malicious injury was upon the county, and that an insurance company who, in pursuance of the terms of a policy, paid the owner of the injured property, could stand in the place of that person, and in his name recover from the county such compensation as the grand jury might allow.

This absence of decision appears to me to point to the matter having been determined under some previous Act under circumstances that made the principle of the determination applicable to the new enactment, 6 & 7 Wm. 4, c. 116, s. 135.

In my opinion, the case cited by Mr. Henry in the course of his very clear and able argument—*Mason* v. *Sainsbury* (2)—is a determination of this nature. It was an action under the 1 Geo. 1, c. 5, s. 6, brought in the name of the owners of a house, by its insurers, against the hundred, to recover the loss occasioned by the demolition of the house by rioters. The insurers had paid

(1) 32 I. L. T. R. 32. (2) 3 Dougl. 61.

Appeal. 1914. BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY *v.* CO. COUNCILS OF CAVAN AND LEITRIM. Palles C.B.

the owners under their policy the amount of the loss, and it was held that the insurers could recover in the name of the insured against the hundred.

Mr. Henry admitted that if the principle of this case applied to a presentment for a malicious injury under our present Grand Jury Acts, the insurance here cannot be taken into consideration to reduce the amount of the presentment.

I am clearly of opinion that the principle of *Mason* v. *Sainsbury* (1) does apply to and rule the present case. The liability of the barony or county here had for its basis, as had the cause of action in *Mason* v. *Sainsbury* (1), the old liability of the hundred for negligence by reason of their omission to arrest felons upon hue and cry. This liability is stated by Lord Coke, 2nd Institute, page 170, in his comment upon the Statute of Westminster the First, to have existed before that statute, and I rather think that it was part of the common law, and descended from pre-Norman times. This, however, is immaterial. Be it as it may, the matter was made the subject of Parliamentary enactment by the Statute of Winchester, 13 Edw. 1, and later on by the 28th Edw. 3, c. 11. Both of these statutes were of course long before Poynings' Act, and were extended to Ireland by that Act.

The Statute of Winchester (13 Edw. 1, st. 2, c. 2), after providing for the making of inquests in towns, hundreds, franchises, and counties, proceeds:—"and if the country will not answer for the bodies of such manner of offenders, the pain shall be such that every country, that is to wit, the people dwelling in the country, shall be answerable for the robberies done and also the damages; so that the whole hundred where the robbery shall be done, with the franchises being within the precinct of the same hundred, shall be amenable for the robberies done."

In the statute of 28 Edw. 3, c. 11, there is a recital showing that the object was to protect merchants coming into the country, and passing through the country; and the words of paragraph 4 are:—"and if the country do not answer of such offenders the pain shall be such, that every country, that is to say, the people

(1) 3 Dougl. 61.

dwelling in the country, shall answer of the robberies done, and of the damages."

The Irish Act, an Act for the following of Hue and Cry (10 & 11 Ch. 1, c. 13), recites that by these two ancient statutes made in England (13 Edw. 1, st. 2, c. 2, and 28 Edw. 3, c. 11) it was for the better repressing of robberies and felonies (amongst other things) enacted to this effect "that if the country do not answer for the bodies of such malefactors, that then the paine should be such, that is to wit, that the people dwelling in the country shall be answerable for the robberies done, and the damages, so that the whole hundred where the robbery shall be done, with the franchises which are within the precincts of the same hundred, shall answer the robberies done," and then enacts that the inhabitants and resiants of every hundred or barony, with the franchises within the precinct thereof, wherein negligence, fault, or defect of pursuit, and fresh suit after hue and crie made shall happen to be, shall answer and satisfie the one moietie of every such summe of money and damages as shall by force or virtue of the said statutes, or either of them, be recovered against the hundred or barony in which robberie or felonie shall at any time hereafter be committed or done; and that the same moiety may be recovered by action . . . in the name of the Clerk of the Peace of the County and shall be to the use and behoof of the hundred or barony where any such robberie or felony shall be committed."

By a later Irish Act, 7 Wm. 3, c. 21, it is enacted that the inhabitants of every barony or county shall make full satisfaction and amends for all robberies, burglaries, burning of houses or haggards of corn, killing or maiming of cattle which shall be committed by robbers, rapparees, or tories within the barony or county; and by section 3 the person robbed or damnified is enabled to recover his damages against any inhabitant of the county or barony who by that Act is made liable for any part thereof, and that after such recovery and execution the other inhabitants of the county or barony liable thereto shall be rateably taxed for an equal contribution for the relief of the inhabitant against whom execution shall have been had by a tax which shall be raised in manner provided by the statute 10 & 11 Chas. 1, c. 13.

Appeal.
1914.
BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY *v.* CO. COUNCILS OF CAVAN AND LEITRIM.
Palles C.B.

The Act 19 & 20 Geo. 3, c. 37 (Irish), after reciting that doubts had arisen with respect to the construction of the last-mentioned Act, 7 Wm. 3, c. 21, and a later Act amending the same, 9 Wm. 3, c. 9, in order to clear up the doubts, makes certain alterations as to the baronies liable, and by section 4 gives power to the judge who shall try any traverse of a presentment for damages under the Acts of Wm. 3 to award costs.

This appears to have been the law at the time of the passing of the Grand Jury Act, which substituted presentments for actions against the barony or any of its inhabitants.

In England an Act 27 Eliz., c. 13, commences with a recital of the Statute of Winchester and the 28 Edw. 3, c. 11, in terms somewhat similar to that contained in the Irish statute of 10 & 11 Chas. 1, c. 13. By 1 Geo. 1, c. 5, the statute upon which the action of *Mason* v. *Sainsbury* (1) was brought, it is enacted that the damages shall be raised and levied on the inhabitants of the hundred in such manner and form and by such ways and means as are provided by the statute 27 Eliz. for reimbursing the person against whom the money recovered against the hundred shall have been levied. Thus it is shown that the origin of the proceedings both in England and Ireland is the same, the Statute of Winchester.

All of these statutes are *in pari materia*, and I cannot find any trace in them of the difference relied on by Mr. Henry of the hundred in England being treated as in a different position from the barony in Ireland. Neither hundred nor barony is treated as the actual wrongdoer, but in each it is placed in the stead of the wrongdoer, and bound to answer for his default by reason of its presumed negligence in permitting the wrongdoer to escape without arrest upon hue and cry.

There are, in these statutes, differences in details and in procedure between those applicable to England and Ireland respectively; but the same principle is applicable to both, and it appears to me to be impossible to hold, having regard to the common origin of the liabilities of each country, that in one the locality should be the primary fund, and in the other the secondary only. I am of opinion that, as held in *Mason* v. *Sainsbury* (1) as regards England, so also in Ireland, although the

(1) 3 Dougl. 61.

hundred, barony, or county is not criminally responsible, it is for civil purposes put in the place of the wrongdoers, and the primary liability is on the hundred, barony, or county, from which it follows that as between it and the person whose property is damaged his insurer and himself are one.

Yates v. *Whyte*, (1) in which the question was whether the amount of an insurance on a ship could be taken into account in reducing the damages in an action for negligent collision, was decided on the authority of *Mason* v. *Sainsbury* (2); and in *Simpson* v. *Thomson* (3) Lord Cairns says (pp. 284, 285) :—"The case of *Yates* v. *Whyte* (4) involved questions analogous to, and is, it seems to me, decisive of the present," and he then proceeds to quote the judgment of Tindal C.J. :—"I think this case is decided in principle by that of *Mason* v. *Sainsbury*" (2). Thus we have the approval of the House of Lords of *Mason* v. *Sainsbury* (2).

As, having regard to Mr. Henry's argument, this decides the question here, I shall say nothing as to the cases cited by him, except that *Bradburn* v. *The Great Western Railway Co.* (5) decides that such of them as relate to cases under the Fatal Accidents Act are not applicable here.

There it was sought to reduce the damages in an action of negligence by taking into account a sum received by the plaintiff on an accident insurance policy; and Lord Bramwell, after stating that "one was dismayed at the proposition," explained the origin and reason of the rule as to the measure of damages in actions under the Fatal Accidents Act, adding that "it had no bearing on the case of a person suing upon his common law right for injuries caused by the defendants' negligence," to which I take leave to add, for the same reason, "or to one suing on the express provisions of such a statute as we have here."

MORIARTY L.J. :—

In assessing compensation for criminal injury to property in Ireland, the Court is not entitled, in my judgment, to take into consideration the fact that the claimant is insured against loss.

(1) 4 Bing. N. C. 272.
(2) 3 Dougl. 61.
(3) 3 A. C. 279.
(4) *Ib.* 284.
(5) L. R. 10 Exch. 1.

Appeal.
1914.
BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY v. CO. COUNCILS OF CAVAN AND LEITRIM.
Moriarty L.J.

Notwithstanding the very able argument of Mr. Henry for the county councils, I am forced to this conclusion by a consideration of the policy of the statutes which have for centuries been in force providing for compensation for crimes and criminal injury to property. The policy of these statutes I take to be now, and to have always been, to make the inhabitants of the hundred or borough or council, as the case may be, answerable in damages for the crime or criminal injury committed in their district, in order that such crimes should be suppressed by the inhabitants, and that they should be vigilant in assisting to bring such criminals to justice.

To hold that under sect. 135 of 6 & 7 Wm. 4, c. 116, and sect. 5 of the Local Government (Ireland) Act, 1898, only persons who were not insured against loss should be entitled to maintain a claim for compensation would tend to destroy the policy for which the statutes were passed.

At the July assizes, 1897, at Belfast, Lord O'Brien, late Chief Justice, decided in *Jones* v. *Belfast Corporation* (1) this precise point. It was proved that the property injured was fully covered by insurance, and, in fact, that the claimant had been paid the full amount of his claim by the insurance company, and yet the Chief Justice held that the claimant could recover compensation under the Act. The contrary has never been held during the seventy-eight years that this Act of 1836 has been in force, nor under any of the statutes previously in force. There is, in fact, nothing new in the contention of the county councils. So long ago as 1782, before the King's Bench in England, it was decided in *Mason* v. *Sainsbury* (2) that a claimant under 1 Geo. 1, c. 5, sect. 6 (which was an Act to make the hundred yield damages to the person whose property was damnified by rioters), could recover these damages notwithstanding that he was insured against loss; and in *Clarke* v. *Hundred of Blything* (3), decided by the King's Bench in 1823, under 9 Geo. 1, c. 22, where the owner of certain stacks of hay, which were maliciously set on fire, received the amount of his loss from an insurance company, it was held he might,

(1) 32 I. L. T. R. 32.
(2) 3 Dougl. 61.
(3) 2 B. & C. 254.

notwithstanding, maintain his action against the hundred. Abbott C.J. bases his judgment on the intent of the Legislature in this Act (Malicious Burning Act) and others of a like nature, which he says was to make the inhabitants of hundreds vigilant for their own sakes, by making it their interest to prevent the commission of offences, and where that could not be done, to exert themselves to bring the offenders to justice. *Yates* v. *Whyte* (1) and other cases referred to by the Lord Chancellor and the Lord Chief Baron proceeded on the same lines, and can be relied upon as supporting the present judgment.

Now, I can find no difference of substance in the language of the statutes upon which these cases were decided, and the 135th section of the Grand Jury Act, 1836, under which the present claim is brought; and, unless there was some serious doubt as to the propriety of these decisions, we ought not to disturb now the principle upon which they were decided. I think these cases, and the case of *Jones* v. *Belfast Corporation* (2), were all decided correctly. I regard the distinction which Mr. Henry contended for between the statutes upon which *Mason* v. *Sainsbury* (3) and *Clarke* v. *Hundred of Blything* (4) were decided, and the Act of 1836, namely, that in the former statutes the inhabitants were treated as trespassers, and that in the Act of 1836 the county is not treated as a trespasser, is a distinction which, if not fantastic, is not sufficient to entitle him to succeed. Though the county is not treated as the actual wrongdoer, it is put in the place of the wrongdoer and made answerable for his act.

Mr. Henry, however, further contended, on the analogy of the cases decided under Lord Campbell's Act, that the compensation receivable under the insurance ought to be taken into account. The rule that obtained in respect of claims under Lord Campbell's Act (before the Act of 1908 came into force) was that if the insurance was against accident the full amount of such insurance was to be deducted from the damages to be assessed by the jury, while with regard to life policies some deduction ought

(1) 4 Bing. N. C. 272.
(2) 32 I. L. T. R. 32.
(3) 3 Dougl. 61.
(4) 2 B. & C. 254.

Appeal. 1914.

BALLY-MAGAURAN CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY v. CO. COUNCILS OF CAVAN AND LEITRIM.

Moriarty L.J.

to be allowed, as, say, the premiums that would be paid by the family or by himself if the fatal accident had not happened. This rule was first laid down by Lord Campbell himself in 1857 in *Hicks* v. *The Newport Railway Co.* (1), and approved by the Privy Council in 1888 in *Grand Trunk Railway Co. of Canada* v. *Jennings* (2). The rule was a curious one and calculated to lead to absurd results: for instance, a defendant could escape making compensation in damages to the family of a man he had murdered if the man happened to be insured against accident. However, this rule was abolished by statute in 1908, and damages are now to be assessed without taking insurance into account.

At common law, in an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accident insurance policy could never be taken into account in reduction of damages. The plaintiff does not receive the money under the policy because of the accident, but because he has made a contract providing for the contingency. An accident must occur to entitle him to it, but it is not the accident, but the contract, which is the cause of his receiving it. See *Bradburn* v. *Great Western Railway Co.* (3).

I am, therefore, obliged to reject all Mr. Henry's arguments, including that founded on sect. 106 of the Grand Jury Act, 1836, which I only refer to for the purpose of stating that I have considered it and do not think it relevant.

In my judgment the county councils are made primarily liable to pay compensation for a malicious injury, and the Court cannot refuse compensation because the claimant is insured against loss.

Solicitors for the applicant: *Horan & Devine.*

Solicitor for the respondent county councils: *Francis McBreen.*

J. M.

(1) 4 B. & S. 403.
(2) 13 A. C. 800.
(3) L. R. 10 Ex. 1.

KEEFFE, APPELLANT; SHAUGHNESSY, RESPONDENT (1).

K. B. Div. 1914-1915.

Nov. 10, 1914. Jan. 21, 1915.

Local Government—County Council—Disqualification—Acting when concerned in a Contract with Council—County Committee of Agriculture and Technical Instruction—Committee consisting of whole Council and other Persons—Live Stock Scheme—Premium to Member of Council—Status of Committee—Local Government (Application of Enactments) Order, 1898, *Art.* 12 (4*e*) (6) *and* (11)—*Agriculture and Technical Instruction (Ireland) Act*, 1899 (62 & 63 *Vict. c.* 50), *s.* 14.

By sect. 14 of the Agriculture and Technical Instruction (Ireland) Act, 1899 (62 & 63 Vict. c. 50), county councils are empowered to appoint committees, for the purpose of assisting the Department of Agriculture in matters relating to agriculture and other rural industries, consisting partly of members of their own body and partly of other persons. The County Council of Queen's County appointed a committee of agricultural and technical instruction for the county consisting of the whole council and of certain other persons. The respondent, a member of the committee so constituted, and also of the council, was awarded by the committee under their cattle-breeding scheme a premium in respect of a bull. This premium entitled him to a payment of £15 and to certain fees. He was prosecuted for having acted as a member of the county council when disqualified by reason of having entered into a bargain or contract with a committee of the council.

Held, that the County Committee of Agricultural and Technical Instruction was a committee within the meaning of Art. 12 (6) of the Local Government (Application of Enactments) Order, 1898, and that the respondent was disqualified for being a member of the county council.

The expression "committee" in Art. 12 (6) of the Order of 1898 is not confined to then existing committees, but may include a committee thereafter appointed, and appointed under a new statutory authority.

CASE STATED by justices under 20 & 21 Vict. c. 43.

At a petty sessions held at Maryborough on the 21st April, 1914 the respondent was charged as defendant in a summons, in which the appellant was complainant, with having acted on the 7th July, 1913, as a member of the county council of Queen's County, the defendant being disqualified at the time from so acting by reason

(1) Before PALLES C.B., and GIBSON, MADDEN, BOYD, and DODD JJ.

K. B. Div. 1914–1915.

KEEFFE v. SHAUGHNESSY.

of being concerned in a bargain or contract entered into between him and the committee of the county council, to wit, the Queen's County Committee of Agriculture and Technical Instruction, and of participating in the profit of such bargain or contract.

The facts, as proved, were as follows:—

The defendant was elected a member of the Queen's County County Council, and attended the meeting of that council on the 13th June, 1911, and took the usual declaration at that meeting, accepting office. He still continued to be a member, and he acted as such, and voted at a meeting of the council, on the 7th July, 1913. The last meeting of the council he attended was on the 10th September, 1913. At the first annual meeting of the council, on the 13th June, 1911, it was resolved that the County Committee of Agriculture and Technical Instruction be a committee of the whole council, and certain other persons who were then co-opted. The defendant, being a member of the county council, thereby became a member of the Agricultural and Technical Instruction Committee. That committee was appointed for three years, ending June, 1914. The defendant had continued a member of the committee down to the date of the prosecution.

The county committee, under their cattle-breeding scheme, provided a number of premiums for persons who undertook to keep pure-bred bulls. These premiums were usually valued at £15 for the season. The committee advertised for applicants for premiums, and, as arranged, all applications received were considered by the committee. On the 7th February, 1912, a meeting was held for the consideration of applications. The number of applicants exceeded the number of premiums to be given by four. The defendant (who was not present at the meeting) was one of the successful applicants. The defendant was then notified by the secretary of the committee that his application was granted, and, in due course, he provided himself with a suitable bull. The conditions on which the premiums were granted were that the bull be certified to have served a certain number of cows, and that such cows should belong to persons whose holdings were of certain specified valuations. The owner of the premium bull

received fees for the services varying from 1*s.* to 2*s.* 6*d.* according to the valuation of the owners of the cows served. The payment of £15 was made by the county committee to the defendant on the 4th December, 1912, after he had satisfied the committee and the Department of Agriculture that he had fulfilled the conditions on which premiums had been awarded. At a meeting of the county committee on the 5th February, 1913, the defendant applied for and was awarded another premium of £15 in respect of the same bull, the Department having notified the committee that this bull was again eligible for a premium. The defendant did not attend the meeting. The premium was paid to the defendant for 1912 on the 4th December in that year, and for the following year on the 10th September, 1913. In each case the paying order was issued by the committee. Their secretary notified the defendant of the issue of the order in the following terms:—"The Munster and Leinster Bank, Maryborough branch, being the treasurer of the Queen's County Committee of Agriculture and Technical Instruction, has been authorized to pay you the sum of £15, being for bull premium." For at least five or six years prior to 1912 the defendant was a member of the committee, and during that period he annually received premiums for bulls from the committee.

The majority of the justices held that the defendant was not concerned in any way in a bargain or contract entered into with the committee, of which he was a member, and that he did not participate in the profit of any such bargain or contract, and accordingly they dismissed the case.

The opinion of the Court was sought as to whether they were right in so holding.

J. O'Byrne (with him *Serjeant Sullivan K. C.*), for the appellant:—

The prosecution was brought under the Local Government (Application of Enactments) Order, 1898, Art. 12 (11). By the same Article, sub-clause 4 (*e*), a person is disqualified for being a member of a council if he is concerned in any bargain or contract with the council, or participates in the profit of any such bargain or contract; and, by sub-clause 6, "any committee of a

K. B. Div. 1914–15.

KEEFFE v. SHAUGHNESSY.

council" is treated as the council. The committee in this case was appointed under the Agriculture and Technical Instruction (Ireland) Act, 1899 (62 & 63 Vict. c. 50), sect. 14, which enables the council of any county to appoint a committee, consisting partly of members of their own body, and partly of other persons, for the purposes of the Act. It is not mandatory on the council to appoint any committee; and, if they appoint none, the functions under the Act devolve exclusively on the county council. If the county council themselves had discharged the functions under the Act, or if they had appointed a committee consisting exclusively of the entire or of a certain number of their own members, there could be no question whatever about the liability of the respondent. The addition of outsiders does not, we submit, exclude the application of Art. 12 (4*e*), (6), to the case. This is a statutory committee of the county council, and a county council may raise a rate, and apply the same for the purpose of agriculture and other rural industries: Agriculture and Technical Instruction (Ireland) Act, 1899, sect. 19, sub-s. 1. We do not contend that outsiders on the committee are liable to prosecution under Art. 12. Although payment was not made to the defendant till September, the offence was complete in July: *O'Carroll* v. *Hastings* (1); *The King* (*Madden*) v. *Justices of Roscommon* (2).

Lupton and *Henry K.C.*, for the respondent:—

The county agricultural committee is not a committee of the county council, and the Agriculture and Technical Instruction (Ireland) Act, 1899, does not incorporate the penal provisions of the Local Government (Ireland) Act, 1898. A committee of the county council is appointed, "out of their own body," and consists of such number of persons as they may think fit, for the management of certain business; and the acts of every such committee must be submitted to the council for their approval: Local Government (Application of Enactments) Order, 1898, Art. 36 (4). These committees are appointed to deal with the administrative and financial business of the county: Local Government (Ireland) Act, 1898, sect. 1. Article 12 (6) of the Local Govern-

(1) [1905] 2 I. R. 590. (2) [1906] 2 I. R. 173.

ment (Application of Enactments) Order, 1898, applies only to committees appointed in accordance with the foregoing provisions for purposes connected solely with the administration of the Local Government Act. The committees appointed under the Agriculture and Technical Instruction (Ireland) Act are entirely distinct from the committees appointed for the purposes of the Local Government Act. The function of agricultural committees is to assist the Department of Agriculture in matters relating to agriculture and other rural industries: Agriculture and Technical Instruction (Ireland) Act, 1899, sects. 7 and 14. The Department of Agriculture is the controlling body. Certain moneys are placed at the disposal of the Department by Parliament: sect. 15; but the application of these moneys is subject to any conditions which the Department may require: sect. 16 (5). Although councils are empowered by sect. 19 of the Act to raise a rate for the purpose of assisting agriculture and other rural industries, no money can be applied under that section save in accordance with a scheme approved by the Department.

[GIBSON J. referred to *Crump* v. *Lewis* (1).]

In that case a member of a district council was held to be disqualified because he held a paid office under a distress committee appointed under the Unemployed Workmen Act, 1905. The case is, however, distinguishable, inasmuch as sect. 46, the disqualifying section, of the English Local Government Act, 1894, is applied to a distress committee by sect. 6 of the Unemployed Workmen Act.

Serjeant Sullivan K.C., in reply:—

We submit that *Crump* v. *Lewis* (1) is in point. The Local Government (Ireland) Act enabled committees to act on behalf of the councils in regard, not only to functions under that Act, but in regard to any additional functions which might be given by Parliament to the councils. The power of raising money by means of a rate, conferred by sect. 14 of the Agriculture and Technical Instruction (Ireland) Act, 1899, was an additional

(1) [1908] 1 K. B. 858.

K. B. Div. 1914.

KEEFFE *v.* SHAUGHNESSY.

power given to county councils. Article 36 (4) of the Local Government (Application of Enactments) Order, 1898, is enlarged by sect. 14 of the Act of 1899.

[He referred to *Greville-Smith* v. *Tomlin* (1).]

The judgment of the Court was delivered by

Jan. 21, 1915.

PALLES C.B.:

This case comes before us upon a case stated by justices in a prosecution against the respondent, a member of the Queen's County County Council, under Article 12, sub-Art. 11, of the Local Government (Application of Enactments) Order of the 22nd December, 1898, for acting as such a member on the 7th July, 1913, when disqualified. The question is, was he then disqualified?

On the 13th June, 1911 (when the respondent was a member of the county council), it was resolved that the committee authorized to be appointed by the Agriculture and Technical Instruction (Ireland) Act, 1899 (62 & 63 Vict. c. 50), should be a committee of the whole council and of certain other persons then co-opted, and should hold office for three years ending on the 13th June, 1914. The respondent thereby became a member of such committee, and afterwards acted as such member.

The Agriculture and Technical Instruction (Ireland) Act, 1899, enacts by section 14 (1) that the council of any county may appoint a committee for the purposes of that part of the Act (the 2nd), consisting partly of members of their own body *and partly of other persons*, and by section 19, sub-s. 1, the council of the county is empowered to raise by means of the poor rate a sum not exceeding in a financial year a sum equal to a penny in the pound on the rateable value of the whole rural districts in the county, and to apply the same for the purpose of agriculture and other rural industries, or for any other purpose for which they are authorized by or in pursuance of the Act to apply money. By sub-section 4 of the same section no money is to be applied under the section save (*a*) under the provisions of a scheme approved by the Department created by the Act, or (*b*) for

(1) [1911] 2 K. B. 9.

defraying any administrative or incidental expenses incurred with the approval of the Department for the purpose of the Act.

The county council under a cattle-breeding scheme (which we must take to have been approved by the Department) provided a number of premiums (each usually of the value of £15 for the season), for persons who undertook to keep pure-bred bulls upon certain conditions. The committee advertised for applicants for these premiums, and at their meeting on the 7th February, 1912, considered the applications. At this meeting the respondent was one of the successful applicants, and on the 4th December, 1912, having satisfied the committee and the Department that he had performed the conditions on which the premium had been awarded, was paid by the committee the sum of £15. There was a similar award of a premium of £15 to the respondent in the following year, the award of the premium having been made on the 5th February, 1913, and the premium having been paid by the committee on the 10th September, 1913.

The case states that for at least five or six years prior to 1912 the respondent was a member of the statutable Agricultural and Technical Committee, and during this period annually received from the committee premiums for bulls.

It seems quite clear that each of these transactions involved a contract between the committee and the respondent, and that the providing under the scheme of premium bulls was within the meaning of Article 12 (4*e*) of the Order in Council.

Article 12 (6) of that Order provides that the previous provisions of the Article shall apply as if any committee of a council, or any joint committee partly appointed by a council, were that council. The sole question in the case therefore appears to be whether the committee appointed under the Act by the county council was a committee within this sub-article 6.

It was contended by Mr. Henry in the course of an able argument that it was not, and in support of his contention he relied upon two distinctions between the committees of the council existing at the time of the order of 22nd December, 1898, and the statutory committee authorized by the Act of 1899. The first and most important was that the former consisted solely of members of the council, whilst the latter under the statute

K. B. Div. 1915.

KEEFFE v. SHAUGHNESSY.

Palles C.B.

necessarily included as members some persons who were not members of the council. The second was that the acts of the former required confirmation by the council, whilst the acts of the latter were effective and valid without the confirmation of any other body.

Now, first, it seems clear that the expression "committee," in Article 12 (6), was not confined to then existing committees, but might include a committee thereafter appointed, and appointed under a new statutable authority. The order establishes a rule of procedure applicable in perpetuity to county councils, who were capable of obtaining new powers from Parliament, and prima facie this procedure would apply to the proceedings under such new powers so far as the words of the order on their fair construction were applicable thereto.

We have thus to determine whether the effect of these two distinctions, relied on by Mr. Henry, or either of them, is to prevent the statutable committee answering the description of "committee" (which, I think, means "committee of the council") in Article 12.

In approaching this, the first matter to be considered is the mischief for which this Article 12 was intended to supply a remedy. To use the words of Lord Lindley in *Nutton* v. *Wilson* (1) in reference to a similar provision in the English Local Government legislation: "The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise." Now, the statutable committee is plainly within this mischief. There would be the same conflict between interest and duty in the respondent voting on a question whether he himself or an outsider should be chosen as a person who was to undertake to keep a pure-bred bull for the season, so as to obtain a premium, as there would be on a question whether he or another should obtain the contract for a specified work of the council. Next, the committee, although not styled in the Act as committee of the council, is appointed by them, and acts as the delegate of the council.

As regards the second distinction relied on, it would appear

(1) 22 Q. B. D. 744, at p. 748.

to me that there was, in reference to the statutable committee, a greater necessity to provide against this possible conflict between interest and duty than there was in the case of an ordinary committee of the council whose acts would require confirmation by the council, as the very fact of the decision requiring confirmation provided some, although, perhaps, a small, safeguard against possible jobbery. Further, I cannot help thinking that joint committees being introduced into Article 12 (6) shows that the framers of that order considered that the mere fact that all the members of the committee were not members of the same council, did not prevent the principle of the order being applicable to such committee. I am, upon the whole, of opinion that the statutable committee is a committee within the meaning of Article 12 (6).

I have arrived at this conclusion irrespective of authority, but two cases have been cited which, although not exactly in point, tend to support the conclusion: *Crump* v. *Lewis* (1) and *Greville-Smith* v. *Tomlin* (2). They were decided upon legislation in England practically equivalent to our Article 12 (4) (*d*), which is *in pari materia* with the provisions of Article 12, which we have to consider here.

In the first, *Crump* v. *Lewis* (1), it was held that a committee established for an urban district, under the Unemployed Workmen Act, 1905, constituted a committee of the urban district for which it was established. By sect. 1 of the Act of 1905, there was to be established, by order of the Local Government Board, a distress committee of the council of every metropolitan borough in London, consisting partly of members of the borough council, and partly of members of the board of guardians of every poor law union wholly or partly within the borough, and of persons experienced in the relief of distress. Thus, there were there the elements to be considered here of the committee containing members who were not members of the council. There were provisions very similar to those under 62 & 63 Vict. c. 50, but rather more complicated in relation to expenses. Such of them as were incurred with the consent of the central body,

(1) [1908] 1 K. B. 858. (2) [1911] 2 K. B. 9.

K. B. Div. 1915.

KEEFFE v. SHAUGHNESSY.

Palles C.B.

directed by the Act to be constituted, were to be defrayed out of a central fund, under the management of the central body, which was to be supplied by voluntary contributions, and by contributions made on the demand of the central body by the council of each metropolitan borough in proportion to its rateable value. Separate accounts were to be kept of all sums supplied by contributions of the Metropolitan boroughs, and no expenses were to be paid thereout save those of a certain specified class. The council for the urban district appointed the members of the distress committee. It was there held that a person appointed by the distress committee to a paid office held such office under the urban district council within the meaning of section 46, sub-sect. 1, of the Local Government Act, 1894, substantially similar to Art. 12 (4) (*d*), which disqualified a person holding such paid office from being a member of a district council. Lord Alverstone C.J. in giving judgment, after referring to a fact to which there is no equivalent here, viz: that in the Act under consideration there the distress committees are spoken of, and treated as, committees of the district council, uses words applicable to the present case:—"The funds for the payment of the officers . . . are paid out of sums contributed by the urban district councils. The respondent contends that these committees are not to be regarded as committees of the urban district councils because they consist not only of co-opted members of the councils, but of other co-opted persons who are not members of the councils"; and he answers this objection, which is the precise objection to be considered here, in these words, "but these latter are in fact appointed by the councils." This answer applies here. Later on he adds: "The intention of section 46 (*d*) of the Local Government Act, 1894, was to prevent the mischief of paid officers acting or voting as members of the body which pays them."

There are distinctions between that case and the present, in the distress committee being called in the Act a committee of the council, and by one of the Articles of the order adding a term to section 46 of the Act of 1894. The latter circumstance is not referred to in the judgment, and I cannot think that the distress committee being spoken of in the Act as a county committee has at all the importance of the other matters referred to by

Lord Alverstone, which are identical with those in the present case; and, notwithstanding these differences, the case seems to me to support the view I have taken.

In *Greville-Smith* v. *Tomlin* (1), a joint committee was, by agreement between the corporation of a borough and a council of an urban district, to provide hospital accommodation for a borough and a district, half the members of the committee being appointed by the corporation, and the other half by the council; and a clerk, appointed by the committee at a salary to be paid partly out of the funds of the corporation and partly out of those of the council, was held to "hold a paid office under the council" within the meaning of section 46 of the Local Government Act, 1894, and was consequently disqualified from being a member of the district council, notwithstanding that the corporation joined in his appointment and in the payment of his salary. Mr. Justice Ridley in a pithy judgment says: "I think that we ought to construe the section with due regard to the mischief aimed at, and the facts of this case are sufficient to bring it within that mischief."

This case too, although not identical with the present, tends to support the conclusions at which I have arrived.

To my mind it is of the utmost importance that the principle that a member of a county council shall not make, or be under the suspicion of making, money out of his office, should be given full effect to, and that legislation for the purpose of enforcing it should not be frittered away by unsubstantial objections, provided the circumstances plainly bring the case, as they do here, within the mischief intended to be remedied. I hold that I am entitled to construe Article 12 (6), so as to enhance the remedy and suppress the mischief, and I am accordingly of opinion that the committee is a committee within Article 12 (6).

The justices in my opinion ought to have convicted, and the case must be remitted to them with a direction to that effect, and the respondent should pay the costs in this Court.

Solicitor for the appellant: *P. J. Byrne.*

Solicitor for the respondent: *W. X. White.*

C. L.

(1) [1911] 2 K. B. 9.

K. B Div.
1915.
Feb. 5, 8.

MOLONEY *v.* LOOBY (1).

County Court—Decree—Civil bill Appeal—Plaintiff (Respondent) becoming Lunatic—Continuing Proceedings—Jurisdiction of Judge of Assize to appoint Next Friend—45 & 46 Vict. c. 29, s. 4.

A plaintiff in a civil bill had obtained a decree in the county court, from which the defendant appealed to the judge of assize. Before the hearing of the appeal the plaintiff became a lunatic.

Held, that the judge of assize had jurisdiction to appoint a guardian as next friend of the lunatic for the purpose of the appeal, and had jurisdiction to adjourn the appeal to enable such appointment to be made; and that a nominee of the defendant might be appointed if no one representing the plaintiff was willing to act.

The principle of *Canning* v. *Farren*, [1907] 2 I. R. 486, applied.

Special Case, stated pursuant to the provisions of 27 & 28 Vict. c. 99, s. 55, for the opinion of the King's Bench Division, by the Right Hon. Mr. Justice Gibson, sitting as judge of assize at the Spring Assizes, 1914, for the County of Tipperary, South Riding, on the hearing of an appeal from the decision of His Honour Judge Moore dismissing the plaintiff's civil bill for damages. The case set out as follows:—

"A civil bill was issued on the 18th day of July, 1910, in Tipperary County Division (South Riding) of Tipperary, wherein Michael Moloney was plaintiff, and Denis Looby was defendant, claiming £10 damages for that the defendant did wrongfully direct surface-water on the premises of the plaintiff situate at Kildanogue in the County of Tipperary, which civil bill was duly served on the defendant. The action was under the title jurisdiction.

"The action was tried before the county court judge of Tipperary, at Clonmel, at the October Sessions, 1910, who gave a decree for the plaintiff for one shilling damages with title costs. From this decree the defendant appealed, and the appeal came on for hearing at the following spring assizes for the South Riding

(1) Before Cherry L.C.J. and Madden and Molony JJ.

of Tipperary, and it appearing that the plaintiff respondent had become a lunatic between the date of the hearing and the appeal, the appeal was adjourned.

"The plaintiff respondent has since remained, and still is, a lunatic not so found; and the hearing of the appeal was, in consequence, duly adjourned from assizes to assizes, and came before me at the Clonmel spring assizes, 1914, when I again adjourned the appeal to the next assizes, and I consented to state a case for the opinion of the King's Bench Division on the questions hereinafter set forth.

"By consent of both sides neither party is to be entitled to any costs on the hearing of the case stated.

"I am aware of no case in the Superior Courts as to the practice applicable where, after a judgment, the party in whose favour such judgment has been pronounced has become a lunatic; probably in such event the jurisdiction of the Lord Chancellor would be resorted to.

"There appears to be no statute relating to the present question. The lunatic plaintiff, in so far as relates to the appeal, is in the position of a defendant.

"The questions for the decision of the Court are—1. Was there jurisdiction to adjourn? 2. Has the judge of assize jurisdiction to appoint a guardian as next friend of the lunatic for the purpose of the appeal? 3. If he has such jurisdiction, can the judge appoint a nominee of defendant, if no one representing the plaintiff is willing to act?"

Robert Kinahan for the plaintiff:—

This is a *casus omissus* from the county court jurisdiction and procedure. The inability of a county court to appoint a next friend of a person of unsound mind has been judicially noticed: *Palmer* v. *McNamee* (1). Appeals to the judge of assize are regulated by 45 & 46 Vict. c. 29, ss. 4, 6, and 9, repealing ss. 127–130 of 14 & 15 Vict. c. 57. Power to adjourn was given to the judge of assize by the later enactment. His powers and functions were extended, but the class of appellants was not increased. He is to make the order that the inferior tribunal should have made.

(1) 44 I. L. T. R. 112.

K. B. Div. 1915. FOLONEY v. COOBY.

These statutory provisions negative the suggestion that the judge of assize is clothed with all the powers of a High Court judge. He is affected by all the infirmities of the county court jurisdiction and procedure, and cannot resort to that of the High Court, which is frequently inconsistent therewith. The judge of assize could make no order affecting the next friend of a defendant of unsound mind, if such next friend resided in a different county. The powers of amendment conferred by s. 106 of 14 & 15 Vict. c. 57, and s. 48 of 27 & 28 Vict. c. 99, contemplate adding parties to a live suit, and do not solve the difficulty.

A decree is final "in case there shall be no appeal therefrom." "Appeal" is equivalent to "effective appeal." The lodgment of an appeal is only a step. A decree is valid and in force till reversed or varied on appeal, and can only thus be got rid of. There is no presumption that a decree appealed from and unreversed is erroneous: *M'Keown* v. *Henry* (1). The maxim *expressio unius est exclusio alterius* applies here. The Legislature provides that, in the case of the bankruptcy of a plaintiff before decree (40 & 41 Vict. c. 56, s. 64), or the death of one out of two or more plaintiffs or defendants (14 & 15 Vict. c. 57, s. 136), there shall be no abatement. The case of lunacy is a better example of the maxim than that of the death of a sole plaintiff or defendant pending appeal where it was held that the maxim did not apply: *Canning* v. *Farren* (2). The obligation to hear the appeal refers only to an effective appeal. The right of revivor is statutory, and depends on the Judicature Act, which is inapplicable to civil-bill appeals. I concede the power to adjourn, if a power to appoint a next friend exists. [He also cited: *Kelly* v. *Watterson* (3); *M'Guinness* v. *Toal* (4).]

Joseph Kenny, for the defendant:—

The decree is not final when appealed from: 14 & 15 Vict. c. 57, s. 133. The appellant has lodged his appeal, and should not be prejudiced by the lunacy of the respondent. The appeal is therefore effective so far as the plaintiff is concerned. He could do nothing more.

(1) 24 I. L. T. R. 103.
(2) [1907] 2 I. R. 486.
(3) 47 I. L. T. R. 223.
(4) 44 I. L. T. R. 108.

Admittedly there is no express provision in the County Court Acts enabling either the county court judge or the judge of assize to appoint a next friend to a lunatic not so found. The point has never been decided. The opinion of Kenny J. in *Palmer* v. *McNamee* (1) is only a dictum. S. 4 of 45 & 46 Vict. c. 29 imposes a duty on the judge of assize to hear every appeal duly taken. If he has the duty to hear, he must have the power to provide that it can be heard. The Legislature provided that there should be no abatement on bankruptcy of a plaintiff (40 & 41 Vict. c. 56, s. 64), or on the death of any of several plaintiffs or defendants leaving another surviving (14 & 15 Vict. c. 57, s. 136). The case of the death of a sole plaintiff or defendant was not provided for, and the Court held, in *Canning* v. *Farren* (2), that the judge of assize had power to adjourn. This case is analogous. The Court has inherent power to appoint a next friend for the purpose of the appeal, and it exercised such power in *Canning* v. *Farren* (2).

Kinahan, in reply.

Cur. adv. vult.

CHERRY L.C.J.:—

The plaintiff in this case obtained a decree in the county court for damages for trespass, under the title jurisdiction of the Court. From this decree the defendant appealed to the judge of assize. Pending the hearing of the appeal the plaintiff became a lunatic, and has since remained, and still is, a lunatic not so found. The hearing of the appeal was adjourned from assizes to assizes for four years; and, finally, this case was stated by Gibson J. for our opinion and determination, so as to have the case finally disposed of at the ensuing assizes.

Three questions are stated by the learned judge for our decision, the most important of which is the second, for upon the answer to it will depend the answers to the other two. That question is, "Has the judge of assize jurisdiction to appoint a guardian as next friend of the lunatic for the purpose of the appeal?" There is no statute or rule of the county courts

(1) 44 I. L. T. R. 112. (2) [1907] 2 I. R. 486.

K. B. Div. 1915.

MOLONEY v. LOOBY.

Cherry L.C.J.

enabling this to be done; and it is argued that in the absence of such statutory authority, the judge of assize has no jurisdiction to make the order. It is expressly provided by statute that proceedings shall not abate in the county court on the bankruptcy of a plaintiff (40 & 41 Vict. c. 56, sect. 64), or on the death of one or more plaintiffs or defendants leaving another surviving (14 & 15 Vict. c. 57, sect. 136). But, although the cases of bankruptcy and death of parties are at least partially provided for, there is no provision whatsoever for the case of lunacy. Mr. Kinahan argues, with much force, that under these circumstances the maxim *expressio unius exclusio alterius* should be applied, and that we ought not to hold that the jurisdiction is extended beyond what is expressly provided by statute.

There would be a great deal to be said in favour of this view were it not for the decision of this Court in *Canning* v. *Farren* (1), which appears to me to govern this case. There the plaintiff, who was a sole plaintiff, died after having obtained a decree in the county court, and pending the hearing of an appeal. The Court held that the judge of assize had jurisdiction to adjourn the hearing of the appeal to enable a personal representative of the deceased plaintiff to be raised, and his name added to the record, and, upon this being done, to hear and determine the appeal. Exactly the same difficulties arose in that case as to the hearing of the appeal as in the case now before us. There was no statutory provision giving the Court jurisdiction; and the maxim *expressio unius exclusio alterius* applied with still greater force; for the Legislature having provided in express terms for the death of one or more plaintiffs, leaving another surviving, and not having mentioned the case of a single plaintiff dying, could not, it was argued, have intended that the Court should have jurisdiction to deal with the latter case. These considerations formed the basis of the dissenting judgment of Wright J. in *Canning* v. *Farren* (1); but they did not convince the majority of the Court—a very strong one—consisting of six judges, Lord O'Brien C.J., Palles C.B., and Andrews, Madden, Boyd, and Wright JJ. Lord O'Brien delivered, on behalf of the five first-named of

(1) [1907] 2 I. R. 486.

these judges, the judgment of the Court, and he expressly stated at the commencement of his judgment that each member of that majority was responsible, not alone for the result, but for each step of the reasoning which had led to it.

The essential principle of the judgment in that case was, in my opinion, that the obligation to hear the appeal, which is imposed upon the judge of assize by the 4th section of the Act of 1882 (45 & 46 Vict. c. 29), implied, apart from all statutory authority, the existence of a jurisdiction in him to adjourn the appeal, and to bring the proper parties before the Court, so as to enable the questions in dispute between the original parties to be finally determined. If the obligation to hear an appeal implies jurisdiction to substitute the personal representative for a dead plaintiff, surely it must also imply jurisdiction to appoint a guardian for a living plaintiff. Both the actual decision, therefore, in *Canning* v. *Farren* (1), and the reasoning upon which it is based, coerce us to hold that there is jurisdiction to appoint a guardian in the present case, and we must, therefore, answer the second question in the affirmative. A similar answer to the first question naturally flows from this, for an adjournment is in most cases necessary to carry out the duty of the Court.

As to the third question, I think that it is within the absolute discretion of the judge whom he will appoint guardian; and that question, also, must be answered in the affirmative.

MADDEN J.:—

The principle of our jurisprudence which provides for persons of unsound mind, when involved in litigation, the protection of a next friend or guardian *ad litem*, is not the creation of the Legislature. The application of this principle to particular cases is regulated by statutes and rules of Court. But the principle has an origin antecedent to all our legislation. It was borrowed by the chancellors at a very early period from the Roman law, by which the magistrate was bound to appoint a curator to represent, and protect the property of, a litigant who was of unsound mind.

(1) [1907] 2 I. R. 486.

K. B. Div. 1915.

MOLONEY v. LOOBY.

Madden J.

Here then is an appeal regularly taken to the judge of assize by the defendant in a civil bill, against whom a decree has been made in a title case, with one shilling damages. This appeal the judge is by the statute empowered and required to hear. This statutory requirement implies a power to adopt any recognized form of legal proceeding which is necessary to the hearing of the appeal, consistently with the settled principles of our law. The procedure in a case like the present has not been provided by Act of Parliament or rules. It is the duty of the judge to supply it, on the principle *boni judicis est ampliare jurisdictionem*, which has been explained as amplifying its remedies, and applying its rules to the advancement of substantial justice: *Russell* v. *Smith* (1).

This is the principle upon which *Canning* v. *Farren* (2) was decided by this Court, and its application to the present case is free from technical considerations which caused difficulty, and led to a difference of judicial opinion in that case.

MOLONY J.:—

I think this case is governed by *Canning* v. *Farren* (2), and I have nothing to add to the judgments delivered by the Lord Chief Justice and Mr. Justice Madden.

Solicitor for the plaintiff: *David J. Higgins.*
Solicitors for the defendant: *T. H. Sargint & Co.*

A. E. C.

(1) 9 M. & W. 810, at p. 818. (2) [1907] 2 I. R. 486.

ROBERT WATSON AND COMPANY, LTD. *v.* JOYCE (1).

(1914. No. 2068.)

K. B. Div. 1915. Feb. 5, 8, 25.

Practice—Costs—Costs of Summons under the Courts (Emergency Powers) Act, 1914 (4 & 5 *Geo.* 5, *c.* 78), *and the Rules of* 17*th September*, 1914, *Rule* 15, *under said Statute—Amount of Costs—Defended and Undefended Summons—Judicial discretion—Costs of Counsel.*

On a summons to issue execution under the Courts (Emergency Powers) Act, 1914, where the defendant does not appear, the costs of the summons will be allowed, subject to the Judicature Rules regulating and limiting costs.

In ordinary cases, where there are no circumstances to influence judicial discretion otherwise, the full costs in default of appearance are £1 10*s.*, and half-costs 15*s.* Where the debtor appears and obtains the benefit of terms under the statute, unless there are particular circumstances influencing the judge to order otherwise, the parties abide their own costs.

Costs of counsel will only be allowed in exceptional cases.

The normal practice as to costs as above laid down does not interfere with the discretion of the judge in particular circumstances to refuse or increase costs.

APPEAL from an order of Boyd J. in chambers disallowing the costs of a summons, issued on behalf of the plaintiff, under the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), and Rule 4 (1) of the Rules of the 17th September, 1914, under said statute, for liberty to proceed to execution on, or otherwise to the enforcement of, a judgment for £42 15*s.* 8*d.* and costs.

On the 26th February, 1914, the plaintiffs issued a specially endorsed writ, claiming the sum of £52 15*s.* 8*d.* on foot of a bill of exchange, dated the 17th December, 1913, drawn by the plaintiffs upon and accepted by the defendant, and presented at

(1) Before GIBSON, KENNY, and MOLONY JJ. The appeal was opened on the 5th February, before Palles C.B. and Gibson J. The argument was adjourned till February 8th, when the case was re-argued before Gibson, Kenny, and Molony JJ.

K. B. Div. 1915. ROBERT WATSON AND COMPANY, LIMITED v. JOYCE.

maturity and dishonoured, of which dishonour the defendant had notice. The writ was served upon the defendant on the 6th April, 1914. Subsequent to the service of the writ the defendant paid to the plaintiffs, on account of his indebtedness, two sums of £5, one on the 6th April, 1914, the other on the 4th May, 1914, thus leaving a balance of £42 15*s.* 8*d.* due to the plaintiffs. For this balance of £42 15*s.* 8*d.* due on the bill of exchange judgment was entered for the plaintiffs on the 23rd November, 1914. The defendant was a traveller in the employment of Messrs. Walter Brown & Company, Hanover Flour Mills, Dublin, at an annual salary, payable weekly, and it was averred, in the affidavit of the plaintiffs' secretary, on which the summons was grounded, that the defendant was in no way affected by the war.

The plaintiffs' summons for liberty to proceed to execution of the judgment was served on the defendant on the 26th December, 1914, and came before Mr. Justice Boyd, in chambers, on the 25th January, 1915. There was no appearance by or on behalf of the defendant at the hearing, and the judge made an order granting liberty to the plaintiffs to proceed to execution or otherwise to the enforcement of the judgment, but refused to grant any costs of the summons to the plaintiffs.

The plaintiffs appealed to the Divisional Court.

Henry K.C. and *Babington*, for the plaintiffs:—

The provisions of the Courts (Emergency Powers) Act, 1914, providing that a plaintiff shall not proceed to execution of a judgment without leave of the Court are provisions in ease of the defendant. By Rule 14 of the Irish Rules of the 17th September, 1914, made by the Lord Chancellor, under the statute, it is provided that "The proceedings on any application under the Act shall, so far as not expressly provided for by these rules, be conducted in accordance with the ordinary practice of the Court to which the application is made, in dealing with similar matters." Under this rule the ordinary practice as to costs under the Judicature Rules would be applicable to this summons, and ordinarily where, as here, there is no appearance for or on behalf of the defendant, and there are no circumstances affecting costs,

the costs of the application which is rendered necessary by the default of the defendant would be allowed against him. Rule 15 of the Rules of the 17th September, 1914, provides that "The costs of any application under the Act shall be in the absolute discretion of the Court; and the Court may, if it thinks fit, fix the amount of the costs, and direct that they shall be payable forthwith." The question, therefore, is whether the learned judge in this case, in refusing to allow the plaintiff any costs, exercised the discretion conferred by the latter rule. "Discretion" in the rule means "judicial discretion"; that is, discretion founded upon material bases, and not an arbitrary expression of personal opinion. Here there was no dispute as to the plaintiffs' claim; the defendant was admittedly the plaintiffs' debtor, and the judgment entered for the plaintiffs resulted from the defendant's default in discharging his lawful debt. The defendant, having notice of the protection which he could seek under the special legislation under which the summons was brought, not only did not establish any case for that protection, but elected to allow the summons to go undefended. The learned judge had no materials before him for the consideration of the question whether the defendant should not pay the costs of proceedings incurred by his default, and without such materials there was no foundation for the exercise of judicial discretion; consequently, the discretion preserved by Rule 15 was not here exercisable, and the costs should have been allowed to the plaintiffs. Rule 15 of the Rules of 1914 gives no larger discretion than that conferred by sect. 53 of the Supreme Court of Judicature (Ireland) Act, 1877 (40 & 41 Vict. c. 57), and an appeal lies on the question whether the judge did or did not exercise a judicial discretion: *Bew* v. *Bew* (1). Jessel M.R. in *Cooper* v. *Whittingham* (2) lays down a principle as to costs, exactly applicable to this case, in these words:—"As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of costs—the Court has no discretion, and cannot take away the plaintiff's right to costs." Lord Hatherley,

(1) [1899] 2 Ch. 467. (2) 15 Ch. D., p. 501, at p. 504.

K. B. Div. 1915.

ROBERT WATSON AND COMPANY, LIMITED v. JOYCE.

in *Garnett* v. *Bradley* (1), dealing with the provision under the English Act as to costs in the discretion of the Court, describes that discretion as being, necessarily, a "judicial" discretion. *Civil Service Co-Operative Society, Limited* v. *General Steam Navigation Company* (2) is an authority that the Court on Appeal will reverse a decision as to costs in the discretion of a judge where no materials existed upon which the judge could exercise such discretion. Lord Halsbury, in that case, said (p. 765):— "I think it is not within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied." In *Edwards* v. *Martell* (3) it was held that where a judge had deprived a successful defendant of costs on irrelevant grounds there had been no exercise of judicial discretion as to costs.

Cur. adv. vult.

Feb. 25.

GIBSON J.:—

This appeal raises the question whether my brother Boyd acted on a wrong principle in refusing costs of a summons brought by the plaintiffs under the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), in respect of a judgment for £42 15*s.* 8*d.*, on the hearing of which summons the defendant did not appear. Hitherto, the practice judges have acted on the view that the legislation being founded on a financial crisis arising out of the calamity of war, the extra expense resulting from the statutory protection might fairly, in ordinary circumstances, be treated as a loss to be borne by the creditor, where the defendant does not appear and thus gets no benefit from the statute. Many of the judgments were for small sums. Counsel for the plaintiffs contend that the costs of any new procedure required to enforce a judgment should be paid by the debtor, whose non-payment of the judgment, in respect of which he could not or did not claim the statutory protection, made the summons necessary. This contention is of much weight. Unfortunately we have only had argument on one side. We have

(1) 3 A. C. 944, at p. 955.
(2) [1903] 2 K. B. 756.
(3) 24 T. L. R. 25.

ascertained that in England it is the practice to allow costs in such cases; a fixed sum, applicable to normal cases, having been settled so as to save taxation.

Having regard to the statute, the rules thereunder, and to the English practice, we are of opinion that in the type of case before us, costs should be allowed, but subject to our Judicature Rules regulating and limiting costs; these rules should be applied to the emergency procedure attached to the judgment; the statute creates a condition previous to execution. That the same costs should be given in respect of summonses for £20 or £3 debts, would be an untoward result of this attempted statutory protection. When costs are reduced or withheld altogether as a mark of disapproval of actions unnecessarily brought in the High Court, would it be reasonable, or could it have been intended, that the judgment should impose on the defendant an additional debt of £1 10*s*., even in the case of judgments not carrying costs at all?

The practice, in future, will be that, subject to our costs rules, there will be full costs, half costs, or no costs, as the case may be.

In ordinary cases, where there are no circumstances to influence judicial discretion otherwise, having considered the specimen bill of costs brought before us, the full costs, in default of appearance, will be £1 10*s*.; half costs, 15*s*. These costs do not contemplate the employment of counsel.

Where the debtor, however, appears and gets the benefit of terms allowed by the statute, it would seem to us reasonable that (save in particular instances where it may seem good to the judge to order otherwise) the parties should abide their own costs.

The normal practice as to costs is not intended to restrict the discretion of the judge, where the judge may think fit, in the particular circumstances, to refuse costs, or to increase costs, as the case may be.

As in England, it is only in exceptional cases that counsel will be allowed.

My brothers Kenny J. and Molony J. concur in this judgment.

Solicitors for the plaintiffs: *William Harpur & Co.*

C. N. K.

K. B. Div. 1915. Feb. 2.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION, APPELLANTS; BURKE, RESPONDENT (1).

Weeds and Agricultural Seeds (Ireland) Act, 1909 (9 *Edw.* 7, *c.* 31), *s.* 5—*Wilfully giving False Name and Address—Liability of Master for Wrongful Act of Servant*—Mens Rea.

By s. 5, sub-s. 1, of the Weeds and Agricultural Seeds (Ireland) Act, 1909, an officer of the Department of Agriculture and Technical Instruction for Ireland is empowered to enter the shop or other premises of any person who sells agricultural seeds for sowing, and examine and take samples of any agricultural seeds on the premises. By sub-s. 2 the person on whose premises a sample is taken shall, if the officer requires, give the name and address of the person from whom he procured the seeds, and if he refuses to give such name and address, or wilfully gives a false name or address, he shall be guilty of an offence under the Act, and liable on summary conviction to a penalty not exceeding £10.

Held, that the owner of the shop in which the sample is taken is guilty of an offence under the sub-section if such false name and address is wilfully given by the manager of the business, although without the authority or consent of the principal.

The word "wilfully" in the sub-section means "intentionally, and not by mistake or inadvertence."

CASE STATED by justices under 20 & 21 Vict. c. 43.

On the 26th October, 1914, the appellants, as complainants, took out a summons under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), against the respondent, as defendant, charging that the defendant "did at her shop, where she kept for sale agricultural seeds, and where Robert W. Parker, who is an officer of the complainants, took a sample of agricultural seeds on the date aforesaid" [the 28th April, 1914] "under sect. 5 (1) of the Weeds and Agricultural Seeds (Ireland) Act, 1909, wilfully give a false name and address of the persons from whom she procured said seeds, to wit, that she procured same from Messrs. John Lytle & Sons, of Belfast, contrary to the provisions of said Act."

(1) Before CHERRY L.C.J. and GIBSON and DODD JJ.

The summons came on for hearing at Tobercurry Petty Sessions, county Sligo, on the 12th November, 1914. Robert Parker, an official sampler employed by the complainants, proved that on the 28th April, 1914, he attended at the defendant's premises in Tobercurry, and then and there explained to the defendant's manager, Bartholomew M'Loughlin, who he was, and what he required, and then took a sample from a hundred-weight bag, alleged to contain English red clover; that he, Parker, then drew M'Loughlin's attention to the poor quality of that seed, and informed M'Loughlin that he was taking the sample for the complainants, and that M'Loughlin said, "I think it will be all right; I do not know very much about the seed trade, that is how it was received from Messrs. Lytle & Sons, Belfast, from whom Mrs. Burke got all her seed"; that M'Loughlin then showed him, Parker, an invoice for seed, in which there was no mention of white clover and that he, Parker, then put the sample of seed into an envelope on which he wrote, in M'Loughlin's presence, the following entries:—"Description of seed: English red clover. Wholesale vendor, John Lytle & Sons, Belfast; retail vendor, Messrs. J. & P. Burke, Tubercurry. Total consignment, 1 bag, 1 cwt. Date of delivery, 4th April, 1914. Number of bags on hands from which sample was drawn, 1. Place of sampling, Messrs. Burke's shop. Retail price, 1*s.* per lb. Signature of sampler, R. W. Parker."

Parker further deposed that after he had filled in the official entries, as above, M'Loughlin filled in the certificate on the back of the envelope, and that he, Parker, then sealed the envelope with his official seal, No. 31. The sample was then posted by him, Parker, to the complainants. Parker described the seed as a very inferior sample of red clover mixed with white clover, and in appearance old and maggoty, and stated that the labelled price, 1*s.* per lb., was the top price in the county for good red clover. The witness produced a sample of the seed which contained maggots, and also produced a letter from the defendant to the complainants in which the former attempted to explain the state of the seed on grounds which the witness swore would not explain the condition of the seed sampled.

The certificate on the envelope filled in by M'Loughlin was

K. B. Div. 1915.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE.

as follows—"I hereby certify that the seeds from which the sample was drawn were procured by me from John Lytle & Son, of Belfast, on April 4th, 1914. Signature, B. M'Loughlin. Position, Manager, on behalf of J. and P. Burke."

The letter produced by Parker was as follows:—

"Tobercurry, 16*th August*, 1914.

"DEAR SIR,—Yours of the 15th inst. received, A. 17533-14. We beg to say we have made inquiries into the matter referred to. We got all our seeds from Messrs Lytle & Sons, Belfast, and have had nothing but praise as regards their fertility since we commenced selling them four or five years ago. The Department have frequently taken samples before, and never have had any complaint to find with them. With regard to this case of English red clover we had only about one stone of red clover on hands the day the inspector visited our store, as it happened to be outside the door for sale. A few days previously it got accidentally tossed on the floor, and brushed up, which may account for its not being up to the standard. Enclosed is invoice of it, and you can see that the prices of our grass-seeds and clover are up to the standard. We hope, therefore, under the circumstances you will overlook the matter this time, and we will be most cautious as to the safety of our seeds when exposing them for sale in future.

"Yours respectfully,

"J. & P. BURKE."

W. H. Wherrie, seed-buyer of Messrs. Lytle, deposed that the defendant was a customer of his employers, and got from his firm all her seeds, set out in the invoice of the 4th April, 1914, which he produced; that the only red clover therein mentioned was 1 cwt. of red clover, and the defendant got no white clover from Messrs. Lytle in 1914. The witness further deposed that he inspected in Court the sample taken by Parker, and that it was a mixture of red and white clover—mostly white—with ingredients foreign to red and white clover, and was maggoty and old; and he stated that the sampled seed did not go out in the seed supplied by his firm to the defendant, as appeared from the

invoice he produced, that invoice covering all seeds supplied by his firm to the defendants during the year. Witness further deposed that a sample out of the red clover seed, from which the defendant was supplied, had been sent by his firm for analysis to the complainants, and the defendant's explanation in the letter of the 16th August, 1914, could not account for the state of the seed sampled by Parker.

John Breen, an officer of the complainants, deposed that the bags containing the sample taken by Parker, and the sample sent by Messrs. Lytle, were handed sealed and unopened to Dr. Pethybridge, the complainants' analyst.

Dr. Pethybridge, director of the complainants' seed-testing station, deposed that he received the sample taken by Parker, sealed and unopened, and also received the sample sent by Messrs. Lytle in a similar state, and that he analyzed both. Witness deposed, as to the former sample, that a farmer buying it as red clover would get a seed which would only consist of one-sixth red clover; and of this one-sixth, only 7 per cent. was capable, under the most favourable conditions, of growing and producing red clover plants, and, if sold at 1*s.* a pound, a farmer buying would only get 2*d.* worth of red clover, of which only one-fourteenth would grow. Witness also deposed that the white clover seed in this sample was dead, and that this sample showed no evidence of having been spilt and swept up again, as the impurities therein were not such as would occur on the floor of a shop. The sample contained maggots, and, besides red and white clover seeds, contained thirty-six varieties of weeds. As regards Messrs. Lytle's sample, witness deposed that that was a good sample, and that the red clover seeds on the sample taken by Parker could not have been supplied out of the stock from which Messrs. Lytle's sample was taken.

No witnesses were called for the defence, but defendant's solicitor submitted that there was no proof that the defendant had made any statement to Robert Parker.

On behalf of the complainants it was contended that it was within the implied scope of the authority of the defendant's manager, M'Loughlin, to answer questions concerning the goods sold by him on behalf of his employer. On behalf of the defen-

K. B. Div. 1915. DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE.

dant it was contended that the defendant was not liable for the false statement (if it were false) made by her manager; that the section under which the prosecution was brought was a penal section, and contemplated a wilfully false personal statement.

The majority of the justices, being of opinion that the defendant's contention that she was not liable for the statement of her manager was well founded, dismissed the charge on the merits, and gave judgment against the complainants; but, at their instance, stated the present case for the judgment of the Court as to whether they were correct in point of law in such determination.

The Solicitor-General (*James O'Connor, K.C.*), with him *James Rearden*, for the appellants :—

It is recognized that it is a principle of our criminal law that a master should not be held responsible for the unauthorized criminal acts of his servant; but this maxim admits of many exceptions. In the carrying on of business it has been over and over again held that the master is liable for a contravention of a statute relating to such business where the servant to whom the business is entrusted does that which is forbidden by the statute. The only question before the Court in this case is the determination whether the facts of the case, on the construction of the statute under which the prosecution was brought, bring the case within the principle underlying these exceptions to the general maxim as to the criminal responsibility of a master for the wrongful act of his servant. This prosecution was brought under s. 5, sub-s. 2, of the Weeds and Agricultural Seeds (Ireland) Act, 1909 (9 Ed. 7, c. 31), which empowers an officer of the Department to enter the shop of any person who sells agricultural seeds, and to take samples of such seeds, and to require from "the person on whose premises" the sample is taken, the name and address of the person from whom the seed was procured. Refusal to give such name or address, or "wilfully" giving a false name or address, is made an offence under the Act, punishable by fine not exceeding £10. By s. 8, sub-s. 2, the penalty for this offence is to be paid to the Department, and to be applied in aid of the expenses of the Department in execution of the Act. Two points are to be noticed: (*a*) the

offence in question is a statutory offence, not an act criminal *per se*; it is an act punishable by fine, which is to be paid to the official body whose execution of the public duty created by the statute is hindered or obstructed; (*b*) the statute read as a whole is clearly an enactment passed for the protection of the public in the sale and purchase of agricultural seeds, a matter of the greatest importance in an agricultural community. In short, the offence for which the defendant was prosecuted is an act prohibited in the public interest, not criminal *per se*, but rendered punishable by a penalty. These circumstances bring this case into line with the cases decided on analogous offences under the Licensing Code, the Merchandise Marks Act, and the Food and Drugs Acts; and also bring the case within one of the classes of offences in which it is not necessary to prove *mens rea*, specified by Wright J. in his judgment in *Sherras* v. *De Rutzen* (1).

The principle upon which the courts have acted in holding a master responsible for the wrongful act of his servant in the case of statutory offences like that in this case is clearly laid down by Lord Russell in his judgment in *Coppen* v. *Moore* (2). There, a master was held liable, under the Merchandise Marks Act, 1887, for the act of his servant, who marked an American ham as a "Scotch" ham; and Lord Russell said, p. 312: "The decisions in these and other like cases were based upon the construction of the statute in question. The Court, in fact, came to the conclusion that, having regard to the language, scope, and object of those Acts, the Legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorized by the master, and might even have been expressly prohibited by him." In his judgment in *Commissioners of Police* v. *Cartman* (3) the same learned judge, on a case under the licensing code, elaborates the specific application of this principle. "In considering this question" [*i.e.* the responsibility of the master] "we must see what is the object of the Act, and how far that object would be affected or defeated if the construction contended for by the respondent

(1) [1895] 1 Q. B. 918, at p. 922.
(2) [1898] 2 Q. B. 306.
(3) [1896] 1 Q. B. 655, at p. 657.

K B Div. 1915.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE.

were given to this section. . . . Are the licensees in these latter cases" [*i.e.* where the control of the business was delegated to servants] "to be liable under this section for the acts of others? In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment. The scope of the manager's authority, in my view, receives its limitation from the scope of his employment; authority is given to him to do all acts within the scope of his employment. It makes no difference for the purposes of this section that the licensee had given private orders to his manager not to sell to drunken persons; were it otherwise, the object of the section would be entirely defeated." In *Attorney-General* v. *Allen* (1), where a soap manufacturer was held liable for the illegal removal of soap by his servant, Pollock C.B. said: "I think it is quite right that it should go forth to the world that a party who carries on business of this description is responsible in penalties for the conduct of his servants in violating the law, and, if it were not so, the revenue laws would be wholly useless. You would have persons carrying on business by their servants in their absence, and violating the law without any liability." These principles were applied to the case of innkeepers by Cave J. in his judgment in *Massey* v. *Morris* (2), and their application is further illustrated by the decision, under the Food and Drugs Acts, in *Morris* v. *Corbett* (3). In *Fitzgerald* v. *Hosford* (4), a decision of this Court on an analogous offence, Gibson J. (p. 396) said: "Where the statute creates a direct and unqualified duty, the person obliged to perform the duty cannot escape under the doctrine of *mens rea*." *Farley* v. *Higginbotham* (5), where a master was held liable for the refusal by his manager to supply a sample of coffee to the proper officer, is a case directly in point here, and there Wright J. said (p. 310): "An employer is liable for the act of his servant in such a case as this, upon the well-known principle that where the gist of the offence is not in reality criminal, then the master may be held liable. It seems to me that these Food Adulteration Acts

(1) Highmore's Excise Laws, vol. i, p. 7.
(2) [1894] 2 Q. B. 412.
(3) 56 J. P. 649.
(4) [1900] 2 I. R. 391.
(5) 42 S. J. 309.

could not be worked if persons who keep shops were not to be held liable for acts done by their servants in carrying on the ordinary course of business."

Here it cannot be contended that the giving of information was not part of the business of the manager; it was an act of the manager done in the ordinary course of business, and therefore an act within the scope of his employment.

The word "wilfully" does not alter the principle applicable to this case. A "wilful" giving of false information, that is the giving of false information which is intended to deceive, is merely a mode of refusing information. The giving of false information through mistake or by inadvertence would not be the class of withholding of information contemplated as punishable, and is therefore excepted.

Carson for the respondent:—

The respondent's case rests upon two propositions: (*a*) assuming that the word "wilfully" were not in the section under which the defendant was prosecuted, the construction of the statute as a whole shows that it was not intended, in a case like this, that the master should be punished for unauthorized false information given by his servant; and (*b*) the description of the offence with which the defendant was charged as "wilfully" giving false information demonstrates that the defendant cannot be made liable under the circumstance of this case.

In *Derbyshire* v. *Houliston* (1) Hawkins J. said, "Where it is sought to be shown that the Legislature means to punish without requiring proof of moral guilt, such intention must be very clearly expressed." Here the statute clearly expresses that the person on whose premises the sample is taken is the person to give the information, the refusal of which, or the wilful false giving of which, is to be penalized. It cannot be contended that the principle of evading a difficulty in the execution of the statute can be applied as a canon of construction without qualification. If that principle were a canon of construction, it would have been applicable in *Taylor* v. *Nixon* (2).

(1) [1897] 1 Q. B. 772, at p. 776. (2) [1910] 2 I. R. 94.

K. B. Div. 1915.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE.

"Wilfully" in the section under which the prosecution was brought concludes the question in the respondent's favour. Lord Russell in *R.* v. *Senior* (1) defines "wilfully" as meaning that "the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it." Here there is no evidence that the defendant's mind "went with" the act of her manager, and the point conceded by the appellants, that "wilfully" means deliberately, concedes the necessity for moral obliquity in the act which is punishable. Once it is necessary to have proof of moral obliquity, it is necessary to prove *mens rea*; once it is necessary to prove *mens rea*, there cannot be any imputed responsibility thrown upon a master for the wrongful act of his servant, unless that wrongful act was authorised by the master, and was thus an act with which the master's mind went.

In *Roberts* v. *Woodward* (2), decided under the Weights and Measures Acts, it was held that a master was not liable for the wrongful representation made by his servant as to the weight of coal; and Pollock C.B., in his judgment (p. 415), said, "I know of no instance in which a master is criminally liable for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, the act of the master." That dictum was cited with approval by Gibson J. in his judgment in *Taylor* v. *Nixon* (3), an authority on the facts and reasoning applicable to and ruling this case. In that case the act of the servant for which it was attempted to hold the master responsible was a "wilful" obstruction of an inspector under the Food and Drugs Act, and in his judgment Gibson J. expressly distinguishes *Farley* v. *Higginbotham* (4), the case so much relied on by the Solicitor-General, on the ground that the section under which the prosecution in that case was brought did not contain the word "wilfully." Kenny J., in his judgment in *Taylor* v. *Nixon* (3), lays down a proposition which supports the defendant's contention, in these words: "If the word 'wilful' were not found in the section, the argument in favour of making the master,

(1) [1899] 1 Q. B. 283, at p. 290.
(2) 25 Q. B. D. 412.
(3) [1910] 2 I. R. 94.
(4) 42 S. J. 309.

though not morally culpable, liable for an act done by his servant in the course of the latter's employment would be much stronger. The general rule, even in such cases, is that a man is not to be convicted of a crime if he has no *mens rea*; and in order to make him responsible for the act of his servant, it should be clear that the particular act is absolutely prohibited by law" (p. 104).

Here we have a clear provision that the owner of the premises is to be liable, coupled with the definition of the offence as that of "wilfully" giving false information. Under these circumstances the authorities relied on by the Solicitor-General, cases decided under different statutes and under different circumstances, do not apply.

Rearden in reply—

There is only one statutory offence contemplated by the section here in question, namely, the withholding of the required information. Refusal to give any information, and the giving of false information with intent to deceive, are merely different modes of withholding the information which the statute directs should be given. On the principles stated in the authorities cited by the Solicitor-General, the defendant would be liable for the refusal by her manager to give information, so that if the respondent's contention here was to prevail, the anomaly would follow that while on one branch of the section the master is liable for the wrongful act of the servant, on the other he is not. The respondent's contention leads to an absurdity in construction, and therefore fails on the context in which the word "wilfully" occurs. That word has no peculiar magic, but must be construed, as must every other word in this section, so as to make a consistent enactment. In *Taylor* v. *Nixon* (1) the offence in question was coupled with that of bribery, and Gibson J., in his judgment, stated that the acts dealt with were essentially criminal acts; and although (p. 101) he said that without an assisting context "wilfully" conveyed usually personal *mens rea*, here it is clear that not only does the context assist, but actually demonstrates, the contention of the complainants that the defendant is liable for the act of her manager.

(1) [1910] 2 I. R. 94.

K. B. Div. 1915.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE.

Roberts v. *Woodward* (1) may be distinguished on the ground that it was not within the scope of the servant's authority to give the information there, and the dictum of Lord Russell in *R.* v. *Senior* (2), while a useful definition of "wilfully," is not a dictum applicable here, where the context of the section shows that that word does not predicate the necessity of proof of personal *mens rea*

Cur. adv. vult.

CHERRY L.C.J.:—

The respondent in this case was summoned before the justices of the county of Sligo at Tobercurry, charged with the offence of wilfully giving a false name and address of the persons from whom she had procured certain clover seeds, offered for sale by her in her shop at Tobercurry, from which an officer of the Department of Agriculture had taken a sample for the purpose of analysis.

Section 5 (2) of the Weeds and Agricultural Seeds (Ireland) Act, 1909 (9. Ed. 7, c. 31), provides that a person "on whose premises" such sample is taken, shall give, if required, the name and address of the persons from whom he purchased the seeds, "and if he refuses to give such name and address, or wilfully gives a false name or address," he shall be guilty of an offence under the Act, and be liable, on summary conviction, to a penalty not exceeding £10.

It appears from the evidence in the case that the statement upon which the prosecution was founded was made, not by the respondent personally, but by her manager in her shop; and there was no evidence given that she had in any way authorized it, or that she was even aware of its being made.

Under these circumstances the justices, being of opinion that the section contemplated a wilfully false personal statement, and that the respondent was not liable for the false statement of her manager, dismissed the summons. The question for our decision is whether, in point of law, they were right in so deciding.

There is no doubt that the general principle of English criminal law is that a man is responsible only for his own acts, and not for those of his agents or servants unless he has expressly authorized

(1) 25 Q. B. D. 412. (2) [1899] 1 Q. B. 283, at p. 290.

them. A guilty knowledge or some unlawful intention is, as a general rule, necessary to constitute a crime. *Nemo reus est nisi mens sit rea.* The doctrine of the responsibility of principals for the acts of their agents does not usually apply in criminal proceedings. But there are numerous exceptions to this rule. The greater number of these exceptions grafted upon the general rule are cases in which it has been decided that, upon the construction put upon the language of particular statutes, criminal responsibility has been placed upon masters for the acts of their servants. These statutes are usually Acts, such as the Food and Drugs Act, and the Merchandise Marks Act, passed with the object of securing fair and honest dealing in retail trades, by regulations the enforcement of which rests with inspectors appointed by the Government. Cases under these statutes are very numerous. I need only refer to one or two as samples. In *Pain* v. *Boughtwood* (1), decided in 1890, and followed by all courts ever since, it was held that a shopkeeper might be convicted under the Sale of Food and Drugs Act, 1875, of selling adulterated milk, though he was personally unaware of the adulteration at the time of the sale, and that it was unnecessary to prove a *mens rea* to support the conviction. No question arose in that case as to the responsibility of a master for the acts of his servant; but, in a more recent case of *Commissioners of Police* v. *Cartman* (2), it was held that a licensed publican might be convicted of selling intoxicating liquor to a drunken person, though the sale was made in his absence by a servant, contrary to his express directions. The ground of that decision was that in businesses usually carried on, not by the proprietors themselves but by servants on their behalf, the object with which the Acts were passed would be defeated unless the employers were held liable for the acts of their servants done within the scope of their employment. The reasoning upon which the decision under the Licensing Acts was based applies with full force to the statute under which the present proceedings are taken, and the case itself is a strong authority for holding that the decision of the magistrates in the present case is wrong. The seed trade, as well as the licensing trade, is carried on usually by

(1) 24 Q B. D. 353. (2) [1896] 1 Q. B. 655.

K. B. Div. 1915. DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE. Cherry, L.C.J.

salesmen in shops, and there can be no doubt that a manager giving to a Government inspector the information which the owner was bound to give on request, is acting within the scope of his authority. This at once brings the case within the line of authorities under the various statutes referred to in *Coppen* v. *Moore* (1), where, in the words of Lord Russell of Killowen—"the Court, in fact, came to the conclusion that, having regard to the language, scope, and object of these Acts, the Legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorized by the master, and might even have been expressly prohibited by him" (p. 312).

The respondent's counsel in this case relied very strongly upon the decision of this Court in the case of *Taylor* v. *Nixon* (2), but that case is clearly distinguishable from the present one. There, the offence charged was that of obstructing an inspector in taking a sample of whiskey, and the act done by the manager, for which it was sought to hold the publican liable—namely, breaking the bottle—was clearly one which could not possibly be held to come within the scope of his authority.

The use of the word "wilfully" in the section was also relied upon as indicating that the Legislature contemplated a personal act by the person charged with the offence, for if the act relied upon was done by a servant it could not, it was argued, be said to have been "wilfully" done by the master. I do not think that the use of the word "wilfully" can be held so to limit the scope of the offence. "Wilfully" means "intentionally," "not by inadvertence or mistake." It may apply to the act either of the master or the servant. In the case where the statement has been, as a matter of fact, made by the servant, as here, it must be shown, I think, to have been wilfully made *by him*. The indication of the state of mind necessary to constitute the offence is quite independent of the question of responsibility for the acts of an agent.

On the whole, I have come to the conclusion that the Legislature intended this Act to be construed in the same manner as

(1) [1898] 2 Q. B. 306. (2) [1910] 2 I. R. 94.

the Licensing Acts, the Food and Drugs Act, and the Merchandise Marks Act; that the decision of the magistrates was wrong in point of law, and that the case should be sent back to them to rehear, with a direction to them that the respondent ought to be held liable for the statement of her manager, and that this statement, as set out in the case, was within the scope of his authority.

GIBSON J.:—

The question raised is whether the wilful misstatement made by the defendant's manager must be imputed to the defendant so as to make her responsible under section 5, sub-sect. 2, of 9 Edw. 7, c. 31. The Act is not well drafted. Section 5, sub-sect. 1, confers on the officer the right to enter premises where agricultural seeds are kept and to take samples of such seeds. If any person refuses to allow such entry, or obstructs the officer, he is guilty of an offence under section 7. Such person might be a servant.

Sub-sect. 2 is, apparently, confined to the person on whose premises the sample is taken, unless section 7 could be extended to it, which would appear difficult. It imposes on such person an absolute obligation to give the name and address of the person from whom the seeds were procured; refusal to give the same, or wilfully giving the same falsely, is made an offence.

The following points are to be noticed—(1) The offence punishable by fine is not properly of a criminal nature. The only direct provision against the merchant selling bad seed is publication under section 6. The object of sub-sect. 2 is protection for the public analogous to that provided by the statutes 38 & 39 Vict. c. 50, and 50 & 51 Vict. c. 28. (2) The obligation on the merchant is absolute; no duty is imposed on his staff; he cannot by being absent from the premises where business is conducted by sales for his profit, or by delegating the performance of the statutory command to others, excuse violation of the enactment. (3) Refusal by an employee,—certainly by a manager—is the act of the employer: *Farley* v. *Higginbotham* (1); *Taylor* v. *Nixon* (2).

If the employer would be answerable for the employee's

(1) 42 S. J. 309. (2) [1910] 2 I. R. 94.

K. B. Div. 1915. DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION Gibson J.

wrongful refusal, I think the alternative offence of wilfully giving false information must have the same effect. Whether there is frank refusal, or pretended compliance, the mischief is the same; the information is equally withheld. "Wilfully," on the context plainly means "intentionally." It is introduced to protect against innocent mistake. A point-blank refusal could hardly be otherwise than intentional, but information might be given which, though untrue in fact, particularly on the part of an employee, might not have been intended to deceive or mislead. The effect of the sub-section appears clear. *Coppen* v. *Moore* (1), *Cartman's Case* (2), and the reasoning in *Taylor* v. *Nixon* (3) (where the authorities are considered and classified) are direct authorities to support my conclusion. See also *Robinson* v. *Dixon* (4) and *Roe* v. *Woodward* (5). The Legislature subjects traders in seed to specific obligations to safeguard farmers against dishonesty. As such merchants might be limited companies who can only act through employees, and as it is the employer not the employee who is to be fined, clearly the acts of the latter must be attributed to the former. The defendant's construction would make the enactment illusory.

The person who gave the false information was the manager, so that no question of scope of authority can arise. Even if the manager acted in disregard of orders, that could not be a defence, though it might affect the amount of the fine. But if the defendant kept no manager at all and was absent, or if such manager was away, it may be that while the business premises are open for sale to customers, the merchant is under a continuing obligation to have some one on the spot to fulfil the statutory requirements affecting the business carried on in the premises, not merely as to entry and samples, but also as to giving information as to origin. The business contemplated is localized in particular premises, and sales out of doors, as in the case of milk and bread, are not dealt with. *Lambe's Case* (6) may have some bearing on the point, which, upon the facts before us, does not require decision, and I, therefore, express no concluded opinion on it.

(1) [1898] 2 Q. B. 506.
(2) [1896] 1 Q. B. 605.
(3) [1910] 2 I. R. 94.
(4) [1903] 2 K. B. 706.
(5) 15 M. & W. 404.
(6) [1914] 2 I. R. 54.

DODD J.:—

A judge who goes circuit in Ireland is often called upon to decide questions between farmers on whose lands seed has not germinated, or has germinated imperfectly, and the merchant who supplied the seed. A mass of perplexing evidence is given. The local seed merchant bought from a wholesale seed merchant. Witness after witness is called from both establishments to prove that the seed was as described, was pure, and of good germinating capacity. On this question of fact, the farmer can prove only that the seed did not grow, or grew in patches. The fault is laid on the farmer. The fact that it grew, though in patches, is urged as conclusive that it was in the cultivation, not in the seed, that the fault lay.

The judge is also as a rule confronted with legal difficulties. Wholesale merchants and retail dealers alike seek to protect themselves by a stringent "no warranty" clause on the contract note. I have rarely seen one quite so drag-net as this. It is from the wholesale merchant to the local trader, and it would, in turn, I presume, be adopted or adapted by the local trader in his sale note to the farmer. It runs as follows:—"Messrs. John Lytle & Sons, Limited, give no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on those terms, they are at once to be returned."

This clause may not preclude the farmer from recovering damages if the seed be not what it purports to be: *Wallis, Son, & Wells* v. *Pratt & Haynes* (1), adopting Lord Justice Fletcher Moulton's judgment (2), followed in *Fogarty* v. *Dickson* (3); and it may not protect the merchant from being answerable to the public under another statute, *e.g.*, as for false description. But the Act now under consideration creates no offence in respect of these matters.

Prevention is what the Act which we are to construe provides. It does not aim at punishment. It leaves farmers and seed-merchants to their rights and remedies *inter se*. The only

(1) [1911] A. C. 394.
(2) [1910] 2 K. B. 1011.
(3) 47 I. L. T. R. 281.

K. B. Div. 1915. DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE. Dodd J.

punishment, if punishment there be, under this Act, is publicity. But evidence is obtained before the sowing as to the purity and germinating capacity of the seed.

An officer of the Department, as it has come to be called, may enter any shop or store where seeds for agricultural purposes are sold. He can take a sample. The seeds within the statute are grass, clover, flax, cereals, turnips, rape, mangel, carrots, cabbage, and parsnips. He can submit the sample for analysis to a skilled analyst, who gives his report as to the purity and "germination" of the seed, as it is called in the Act. He can require in the shop the name of the merchant from whom the seed has been obtained The department may publish, where and when it pleases, the quality of the seed, the name of the person upon whose premises the sample was taken, and the name of the merchant from whom it was stated to be purchased.

How is the inspector to get the information? By inquiry. When? At the time he is taking the sample. Where? In the shop or store. From whom? From the person in charge.

The person in charge may do one or other of four things on the inquiry being made. He may give the information. He may refuse to give the information. He may give false information. Or he may send for his employer.

The employer in the case before us was Mrs. Fanny Burke, trading as J. & P. Burke. The manager was B. J. M'Loughlin. It does not appear whether Mrs. Burke was or was not on the premises at the time. Mr. M'Loughlin did not refer the officer of the department to her. He did not refuse to give information. He gave particulars which the officer took down on the official form. The description of the seed: English red clover. The merchant from whom the seed was bought, John Lytle & Sons, Belfast. The total consignment, 1 bag, 1 cwt. The date of delivery, the 4th day of April, 1914. The retail price, 1*s.* per lb. The sampler having filled in the particulars, signed the document in Mr. M'Loughlin's presence, and Mr. M'Loughlin signed the certificate:—"I certify that the seeds from which this sample was drawn were procured by me from John Lytle & Sons, Belfast, on April the 4th, 1914. Signature, B. J. M'Loughlin. Position, Manager on behalf of J & P. Burke."

Under the statute if the person on whose premises the seed is found refuses to give such name or address of the merchant from whom the seed was got, or wilfully gives a false name or address, he is liable to a penalty not exceeding £10. The fine is upon the person on whose premises the seed was for sale. There is no fine upon any servant of the trader. It is the interest of the master, if he be an honest trader, that the information should be given. If the seed is defective by reason of the default of the wholesale merchant, it is the duty of the officer of the department to proceed further. He did proceed further; a sample was obtained of Messrs. Lytle's seed, and evidence was had before the justices that the seed sampled in Tobercurry was not the seed supplied by Messrs. Lytle.

The contention made by counsel for the defendant is that Mrs. Burke is not responsible for the statements of her manager, under the circumstances.

Suppose the seed had been sold to a farmer, and an action brought for damages, Mrs. Burke would have been bound by the statements of her manager at the sale. In the commercial aspect of the case, the act of the servant is the act of the master. But this is a commercial case in all its aspects. If the shop were in the ordinary charge of the owner, and the officer of the Department called in her absence, it would be the duty of the servant to report at once to his employer matters that affected the honesty and probity of the business. The inference is irresistible that the manager was acting within the scope of his authority, and was acting solely in the interest of his employer in withholding true information.

Why is the owner of the shop to escape the fine? The statement was never repudiated by her. On the contrary, she asserts in a letter that was put in evidence that the statement was true. She says, "We got all our seeds from Messrs. Lytle & Sons, Belfast," and goes on to make the futile case that the seed had "got accidentally tossed upon the floor and brushed up, which may account for its not being up to standard."

What does Dr. Pethybridge, the director of the Department's seed-testing station, say as to this? He swore that a farmer buying it as red clover would get a seed which would consist only

K. B. Div. 1915.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE.

Dodd J.

of one-sixth red clover, and of this one-sixth only 7 per cent. was capable, under the most favourable conditions, of growing and producing red clover plants, and, if sold at 1*s.* a pound, a farmer buying would only get 2*d.* worth of red clover, of which only one-fourteenth would grow. He also swore that the white clover in the sample was dead. The sample taken showed no evidence of being spilled and swept up again, as the impurities therein were not such as would occur on the floor of a shop or store. The sample contained maggots, and, besides containing red and white clover seeds, contained *thirty-six varieties of weeds.* He also swore that such red clover seeds as were in the sample could not be supplied from the same stock as the sample supplied by Messrs. Lytle.

I am afraid that the dishonesty of the transaction cannot be gainsaid. That, however, is not the question. The question is, is Mrs. Burke responsible for the untrue information?

Mr. Carson relies as a defence on some well-known maxims, and also on some reported cases. Maxims that were framed to secure justice are relied upon in their old age to protect injustice.

The maxim here chiefly cited is the axiom, "You cannot impute to a master that he has given authority to a servant to commit a crime." Or, approaching it from the other side, "It cannot be supposed to be within the scope of authority of a servant to commit an offence against the law." There is a curious satisfaction sometimes in meeting a point of over-niceness with a point of still more subtle nicety. Whether the servant answers falsely or truly he cannot, under this Act, be made responsible. He could not be proceeded against. He might, no doubt, if he made a false representation on which some person acted to his detriment, and if the other elements in an action for deceit at common law were present, be sued. But, so far as I can see, in this case he is no more amenable to justice than the maid who falsely says to a visitor that her mistress is not at home. It was within his province to answer the query put to him. If put to him by an intending purchaser, it was certainly his duty to reply. The officer of the Department was, at any rate, a quasi-purchaser. He was more. He was an official duly empowered by the State

to make the inquiry. It was the duty of the manager to his own employer to answer the officer of the Department. The sampler might not be able to proceed against him personally for deceit, since he personally was not damaged by the false representation; but if it was his duty to reply, even if he replied falsely, he is acting for his employer.

I adopt and apply to the facts of this case the reasoning of Lord Macnaghten in the elaborate and exhaustive judgment—to use Lord Atkinson's description of it—in *Lloyd* v. *Grace, Smith & Co.* (1). No doubt the discussion there was as to the civil liability of the employer, for a fraud in the course of the employment of the servant, which was not done for the employer's benefit; but the principle applies, as stated in the judgment of Willes J. in *Barwick* v. *English Joint Stock Bank* (2), which was adopted by Lord Macnaghten (p. 733) as probably the best explanation that can be given (p. 736): "In all these cases" (cases of fraud by the servant) "it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

If the principle be applicable to a fraud committed by the agent for his own benefit, it is, I think, applicable to a statement made in the course of the employment of a servant, for the benefit of his master, to a public official authorized to inquire.

Mr. Carson cited some authorities, and it is from no want of courtesy to him that I do not go through them in detail. His able argument lost nothing by the modesty with which he presented it. The word "wilfully," which he so strenuously relies upon, has been the subject of much discussion. Here, I think, it simply means deliberately, intentionally if you will, not by mistake or misapprehension.

Each case depends upon its own statute and its own facts. The Court must be satisfied that what was said or done was said or done within the scope of the servant's authority, and if done wilfully by

(1) [1912] A. C. 716. (2) L. R. 2. Ex. 259.

K. B. Div. 1915.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION v. BURKE.

Dodd J.

the servant in that capacity, it is not the less done within the scope of his authority. The case most relied upon was *Taylor* v. *Nixon* (1). It was decided by a Court presided over by my brother Gibson. He is with us to-day. He has the best right to say if the facts of this case bring it within that authority; he says they do not. They appear to me to be clearly differentiated. The judges of the Court there held that a servant guilty of the offence of a criminal obstruction of an officer in the discharge of his duty under the particular statute then under review, an offence which was bracketed with bribery, was not acting within the scope of his authority, but was acting upon his own initiative as a criminal. The other case of *Farley* v. *Higginbotham* (2) is against Mr. Carson. It is a clear authority that one refusing to answer under the statute there under review was acting within the scope of his authority.

I regard the giving of false information as being of the same class as refusing to give any information. Each is a withholding of true information. True information is what the Legislature demands. Unless the Department gets it, the statute will be nugatory. For these reasons I think that the justices were wrong. I think Mrs. Burke was responsible for the acts of her manager, and that the question should be so answered.

Solicitors for the appellants: *St. G. Robinson & Williams.*
Solicitor for the respondent: *M. J. Howley.*

C. N. K.

(1) [1910] 2 I. R. 94. (2) 42 S. J. 309.

INLAND REVENUE COMMISSIONERS *v.* COOKMAN (1).

K. B. Div. 1915. Jan. 26, 27, 28. Feb. 25.

Revenue—Estate Duty—Land purchased under Land Purchase Acts and subject to Annuity—Property passing on Death—Principal Value—Method of Ascertainment — "Incumbrance" — Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 7 (1) (5)—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 60 (2).

The principal value, for the purposes of estate duty, of a holding purchased under the Land Purchase Acts, is the price which the property would fetch if sold in the open market, at the time of the death of the deceased, subject to the annuity payable to the Land Commission.

Such annuity is not an "incumbrance" within the meaning of section 7, sub-sect. 1, of the Finance Act, 1894.

APPEAL, by the Commissioners of Inland Revenue, against the decision of a referee under sect. 33 of the Finance (1909–10) Act, 1910. The facts, as set out in the petition of appeal, were as follows:—

William Cookman, late of Kiltrea House, Enniscorthy, county Wexford, justice of the peace, died on the 19th November, 1911, possessed, *inter alia*, of certain lands of Kiltrea and Newtown, in the county of Wexford, containing 114A. 2R. 32P. statute measure, which had been purchased under the Irish Land Purchase Acts, and were then subject to an annuity of £52 6*s.* 6*d.*, payable to the Irish Land Commission, the redemption value of which, at the date of the said William Cookman's death, was £1557 17*s.* 7*d.* The net value of all the property passing on the death of the deceased exceeded £1000. The Commissioners of Inland Revenue, under the provisions of sect. 7 (5) of the Finance Act, 1894, and sect. 60 of the Finance (1909–10) Act, 1910, estimated the principal value of the aforesaid lands of Kiltrea and Newtown at the sum of £2357 17*s.* 7*d.*

Under the provisions of sect. 60, sub-s. 3, of the Finance (1909–10) Act, 1910, the executor of William Cookman appealed against the decision of the Commissioners as to the value of the

(1) Before PALLES C.B. and GIBSON and DODD JJ.

K. B. Div. 1915. INLAND REVENUE COMMRS. v. COOKMAN.

said lands, upon the grounds that the property would not have fetched £2300 in the open market at the time of the death, and that "the practice in vogue of adding to the price which the property, it is supposed, might fetch, if sold subject to a mortgage, the amount of the mortgage, and deducting the mortgage from the amount, is not authorized by the instructions addressed to the Commissioners of Inland Revenue under the Finance Acts in order to ascertain the net principal value for assessments."

Mr. George Hewson, the referee duly authorized in that behalf, gave his decision in respect of said appeal in the following terms:—

"The value of the lands in Kiltrea and Newtown, containing 114A. 2R. 32P. statute measure, purchased under the Land Purchase Acts subject to an annuity to the Irish Land Commission of £52 6*s.* 6*d.*, is £1917.

"I find the appellant entitled to £10 10*s.*, expenses in this appeal.

"The point I am asked to decide is the principle on which the principal value of property should be arrived at under sect. 60 of the Finance Act, 1910, the Inland Revenue contending that, in the case of holdings bought under the Land Purchase Acts, it should be calculated on the sum that the lands would fetch, subject to the annuity, in the open market, in this case estimated at £800, to which should be added the redemption value of the annuity at the date of death, which was calculated at £1557 17*s.* 7*d.*, making in all a round sum of £2357.

"The appellant contends that the principal value means the fee-simple value in the open market of the property, free of all incumbrances.

"I think the latter is the correct view. If the principle on which the Inland Revenue assess the principal value is accepted, it would create the position that every year the payments to the sinking fund by the occupier, who is the owner in fee, would reduce the capital value, and this would be effected in a marked degree in holdings bought under the earlier Land Purchase Acts, where annuities can be redeemed in stock which can at present be bought at a discount of 20 to 25 per cent.

"I cannot hold that a different principle should be adopted

in estimating the value of incumbered land and land free of incumbrances.

"It was not contended by the Treasury that the principal value was represented by the amount originally advanced to the occupier to buy the fee-simple, plus what may, for convenience, be called the tenant-right.

"The Treasury gave no evidence of value, and I have, therefore, fixed the principal value, as above, on the only evidence before me, which was not of a very satisfactory character."

The petitioners submitted that the decision of the referee was erroneous on the following ground:—

That the principal value, within the meaning of sect. 7 (5) of the Finance Act, 1894, and sect. 60 of the Finance (1909–10) Act, 1910, of the lands of Kiltrea and Newtown, at the date of William Cookman's death, was correctly estimated by the Commissioners of Inland Revenue at £2357 17*s.* 7*d.*

They prayed that it might be declared that the principal value of the said lands on the 19th November, 1911, the date of the death of William Cookman, within the meaning of sect. 7 (5) of the Finance Act, 1894, and sect. 60 of the Finance (1909–10) Act, 1910, was £2357 17*s.* 7*d.*

In his answer, the respondent submitted, (1) that in arriving at the principal value of the lands under s. 60, sub-s. 2, of the Finance (1909–10) Act, 1910, the Commissioners of Inland Revenue were not entitled to have regard to the existence of the annuity or mortgage payable out of the lands; (2) that the redemption value of the annuity could only be regarded by way of deduction from the principal value when ascertained; (3) that the principal value as fixed by the referee was correct.

During the hearing in the King's Bench Division the petitioners were given leave to amend their petition by claiming in the alternative that the property passing within the meaning of sect. 1 of the Finance Act, 1894, was the equity of redemption in the said lands; that the "principal value" within the meaning of sect. 7 (5) of the Finance Act, 1894, and sect. 60 (2) of the Finance Act, 1910, was the value of that equity of redemption; and that the principal value at the date of the death of the deceased amounted to £800.

K. B. Div. 1915.

INLAND REVENUE COMMRS. v. COOKMAN.

The Attorney-General (*Jonathan Pim K.C.*), with him the *Solicitor-General* (*James O'Connor K.C.*), and *Rearden*, for the petitioners :—

Under the Finance Acts of 1894 (57 & 58 Vict. c. 50), sects. 1 and 7 (5), and of 1910 (10 Ed. 7, c. 8), sect. 60 (2), the principal value for the purpose of estate duty of lands purchased under the Irish Land Purchase Acts is the saleable value of the lands, plus the redemption price of the annuity payable to the Land Commission. These two sums represent the value of the property passing on death; but as the principal value on which duty is payable under sect. 1 of the Act of 1894 is the net value of the estate, the redemption price must be deducted from the total sum arrived at in the manner just indicated. In other words, the principal value in this case is £2357, minus £1557, or £800. The property which passed here was the land subject to annuity. The principle is the same as if it were an equity of redemption, and the thing that is liable to duty is that property and no other thing: *Earl Cowley* v *Inland Revenue Commissioners* (1), *per* Lord Halsbury L.C., at p. 205. The value of the farm subject to this peculiarly advantageous charge is what has to be ascertained. What passed to the executors was property limited and conditioned by this peculiar charge. The forbearance for a long time to call in the purchase-money advanced, and the exceptionally low rate of interest charged, are elements to be taken into consideration in estimating the value. What we are contending for was really decided in *Attorney-General* v. *Jameson* (2), where the Court of Appeal held that the principal value was the price which the property would fetch if sold in the open market subject to conditions, in that case, relating to alienation and transfer. The test of the value of this holding was—to use the expression of Fitz Gibbon L.J. in the case just cited—what a man of means would be willing to pay for the transmigration into himself of the property which passed from William Cookman when he died; what a man would pay for the right to stand in the shoes of the deceased. It is admitted that the saleable value of the land subject to the annuity is £800.

(1) [1899] A. C. 198. (2) [1905] 2 I. R. 218.

Henry K.C. (with him *Wylie K.C.* and *Horan*) for the respondent:—

Section 1, the taxing section of the Finance Act, 1894, imposes estate duty upon "the principal value, ascertained as hereinafter provided, of all property," &c. Thus every provision in the statute in reference to ascertainment of value is incorporated in the taxing section: *Attorney-General* v. *Robinson* (1), *per* Palles C.B. Section 7, sub-sects. 1 and 5, prescribes the method of ascertaining the principal value of an estate for the purpose of estate duty. In determining the value of an estate, allowance is to be made for debts and incumbrances; and every debt or incumbrance for which an allowance is made is to be deducted from the value of the land or other subjects of property liable thereto: sect. 7, sub-s. 1. Therefore, in the case of fee-simple property burdened with an incumbrance, the principle to be adopted is to ascertain, first, the full value of the property without any incumbrance, and then to deduct from the sum so ascertained the value of the incumbrance. The value of the holding in this case as a free property is £1917, and from that there must be deducted £1557, the redemption price of the annuity, leaving £360, net principal value assessable to duty. According to the method adopted by the Crown of valuing the land subject to the annuity as the property that passes, sect. 7, sub-s. 1, so far as it relates to the deduction of incumbrances, would have no operation. The process of adding the redemption value of the annuity, £1557, to the value of the land subject to the annuity, and deducting the same sum from the total of these two figures, is merely a device which, it is pretended, gives the benefit of sect. 7, sub-s. 1, to the executors of the deceased. On the case, as presented by the Crown, the value of the land subject to the annuity, regarded as the property which passes, is £800; and the process of addition and subtraction, supposed to give effect to sect. 7, sub-s. 1, leaves this figure unaltered. The question of treating the equity of redemption as the estate which passes, where the property is incumbered, was raised by Mr. Danckwerts K.C., in the *Attorney-General* v. *Duke of Richmond* (No. 1) (2); but when the case went to the House of

(1) [1901] 2 I. R. 67, at p. 77. (2) [1907] 2 K. B. 923; [1908] 2 K. B. 729.

K. B. Div. 1915.

INLAND REVENUE COMMRS. v. COOKMAN.

Lords (1), he abandoned that argument. The Court held that the bonds in question in that case were incumbrances, for which an allowance ought to be made by way of deduction,

The expression "incumbrances" includes mortgages and terminable charges: sect. 22, sub-s. 1 (*k*), of the Finance Act, 1894; and this definition includes an annuity payable to the Land Commission in respect of an advance made for the purchase of a holding under the Land Purchase Acts. The powers of mortgagees under the Conveyancing and Law of Property Act, 1881, are conferred upon the Land Commission by sect. 4 (*c*) of the Purchase of Land (Ireland) Act, 1885, and sect. 18, sub-s. 1, of the Land Law (Ireland) Act, 1887. These instalment mortgages payable to the Land Commission differ in no way from ordinary mortgages, and the fact that the Land Commission is a public body is immaterial: *Antrim Land Company* v. *Stewart* (2), per FitzGibbon L.J., at p. 368; *In re Parkinson* (3); *Ex parte Strabane Rural District Council* (4).

In estimating the gross value of small estates which are given the benefit of the fixed duties of 30*s.* or 50*s.*, as the case may be, if the property is subject to, or liable to be made subject to, a charge for securing "an advance made, or to be made, for the purpose of the purchase thereof"—words identical with those used in the Land Purchase Acts in relation to the advances for the purchase of holdings: see s. 2, Purchase of Land (Ireland) Act, 1885, ss. 18 and 20, Land Law (Ireland) Act, 1887—the value thereof shall be taken to be its value subject to such charge or liability: sect. 61, sub-s. 2, of the Finance (1909–10) Act, 1910. That is a declaration by the Legislature that in all other cases the value to be taken in the first instance is the gross value or the full value of the property unincumbered; only in the cases of those small estates is the land to be valued subject to the charge. If the contention of the Crown is right that the value to be taken in all cases is that of the equity of redemption or of the land subject to the charge, then sect. 61, sub-s. 2, of the Finance Act, 1910, was wholly unnecessary. There is nothing in either the Act of 1894

(1) [1909] A. C. 466.
(2) [1904] 2 I. R. 357, 360.
(3) [1898] 1 I. R. 390.
(4) [1910] 1 I. R. 135.

or that of 1910 to warrant the method which the Crown is seeking to enforce. The "principal value" of incumbered property of which the deceased was owner in fee is, not the principal value of the equity of redemption, but the principal value of the property free from incumbrances, the allowance for incumbrances being made afterwards out of the value of the whole estate, though in respect of particular subjects of property: Hanson's Death Duties, 6th ed., p. 157.

The Solicitor-General in reply:—

That there is a fallacy underlying the contention of the other side is clear from the following sum in arithmetic:—Suppose the charge in this case was vested in Mr. X. instead of in the Land Commission, and that Mr. X. and Mr. Cookman died upon the same day. It is obvious that Mr. X. and Mr. Cookman would have the entire property between them, which, *ex concessis*, is of the value of £1,917. According to the other side, however, Mr. Cookman's interest is only worth £360. Mr. X.'s charge, although redeemable for £1,547, is not worth £1,547 in the market, but a much less sum, and such less sum would, according to sect. 7 (5), have to be taken. This sum would probably not amount to more than £1,100, and the result would be that the combined values would only amount to £1,460, whereas they ought to amount to £1,917. The fallacy lies in subtracting from the £1,917, which is cash, a sum of £1,547, which is not cash value at all, but merely the price at which the Land Commission are willing to release their charge. Nobody else, however, is willing to give £1,547, and, therefore, it is not the value of the security at all. If, therefore, any sum in subtraction is necessary, what must be ascertained is, what is the market value of this peculiar charge, as such, deducting same from £1,917. While making the addition or subtraction one must put things in the same terms, or reduce them to a common denominator.

Alternatively, we say there is no necessity for any sum in subtraction. The property passing on the death is the tenant purchaser's interest: *Cowley's Case* (1); and the principal value

(1) [1899] A. C. 198.

K. B. Div. 1915.

INLAND REVENUE COMMRS. *v.* COOKMAN.

thereof is the market price of such interest: sect. 7, sub-s. 5, of the Act of 1894. This market price is admitted to be £800, which we say is the principal value. In arriving at the £800, "allowance" has been made for the charge due to the Land Commission. The process of arriving at the gross value, and then deducting the incumbrances, applies only to an ordinary incumbrance, and not to such a burden as an annuity payable to the Land Commission.

Cur. adv. vult.

The judgment of the Court was delivered by—

Feb. 25.

PALLES C.B.:—

The question for decision in this appeal (which is brought by the Commissioners of Inland Revenue against the decision of a referee under the Finance Act, 1910) involves the principle of valuation for estate-duty purposes of a holding, upon the death of a former tenant who had purchased the fee-simple under the Land Purchase Acts, but the purchase-money of which had not been wholly paid off at his death.

From the large number of properties which are held under a similar tenure the case is an important one, although it does not seem to me to involve any difficult question of law.

All the material facts are admitted. William Cookman died on the 19th November, 1911, possessed, *inter alia*, of lands of Kiltrea and Newtown, in the county of Wexford, containing 114A. 2R. 32P., statute measure, which he formerly held as tenant, but which he had purchased under the Land Purchase Acts. To effect this purchase, the State advanced a sum of £1610, in consideration of which the lands were charged under those Acts with an annuity for a long term of years, payable to the Irish Land Commission as a trustee for the Crown, of £52 6*s.* 6*d.* This annuity was under those Acts redeemable. Its redemption value at Mr. Cookman's death was £1517 17*s.* 7*d.* The value of the fee-simple of the lands, discharged from this annuity, was £1917. The lands subject to the annuity, if sold in the open market at the time of Mr. Cookman's death, would have fetched the price of £800.

The Commissioners, appellants here, contend that the principal

value of the lands, for estate-duty purposes, is £2357 17*s.* 7*d.* (being the aggegate of this £800 and the £1557 17*s.* 7*d.*, the redemption price of the annuity), from which aggregate, they admit, is to be deducted (under sect. 7 of the Act of 1894) the value of the charge, £1557 17*s.* 7*d.*, leaving the net amount assessable to duty at £800; and by amendment allowed at the hearing they claim, alternatively, that the principal value is the £800 as the market value of the deceased's interest which passed at his death.

On the other hand, the respondents here, the executors of the deceased, submit that that value is to be ascertained by deducting from the £1917, the value of the unencumbered fee-simple, the sum of £1557 17*s* 7*d.*, the redemption price of the annuity, which would reduce the assessable value to £359 2*s.* 5*d.*

The judgment of the referee was that the respondent's mode of valuation is right in principle; and we have to decide whether it is so or not, and, if not, which of the two modes insisted on by the Commissioners is the right principle for the valuation of such an interest in lands?

Estate duty is granted by the first section of 57 & 58 Vict. c. 30, by the words "a duty upon the principal value, ascertained as hereinafter provided, of all property real or personal, settled or not settled, which passes on the death of such person."

The material inquiry is, what property in these lands passed upon the death of Mr. Cookman? Undoubtedly the unencumbered fee-simple did not pass. The annuity vested in the Land Commission remained vested in them, notwithstanding Mr. Cookman's death, in identically the same state as it had been vested in them on the day before the death. Cookman never had any greater estate than the fee subject to the annuity. The annuity appears to have been a statutable reservation to the Crown, and to be practically of the same character, during its existence, as a Crown rent. It was, from its creation, vested in a trustee for the Crown. At no time was it assessable to estate duty, and, in my opinion, that which passed on the death was the farm of land with all the statutory privileges and subject to the statutory liabilities, attaching thereto, in other words, the fee-simple subject to the annuity; and if

K. B. Div. 1915.

INLAND REVENUE COMMRS. v. COOKMAN.

Palles C.B.

that be so, it is on the principal value of that estate, subject to that charge, ascertained as in the Act provided, that the duty is to be assessed.

Whatever may be the nature of the unencumbered fee-simple, whatever may be the value of the charges on that fee-simple prior to the estate of Cookman therein, are matters of no importance, save as elements in ascertaining the value of the thing that passed, so far, if at all, as under the provisions of the Act they can be taken into consideration for that purpose. Now, which of these provisions may be taken into consideration for that purpose?

This brings us to the 7th section of the Act of 1894 (57 & 58 Vict. c. 30), and the 60th section of the Act of 1910.

Sub-sect. 1 of section 7 of the Act of 1894 has been relied on by Mr. Henry. It enacts: "In determining the value of an estate for the purposes of estate duty, *allowance shall be made* for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made for" certain matters enumerated in the sub-section.

Now, it is clear that the thing out of which these allowances are to be made is the value of the property which has passed, or has been deemed to pass, on the death. This is Lord Halsbury's opinion. He says, in *Cowley's Case* (1):—"If I am right that the estate which the second Earl possessed was that which came to the third Earl by the second Earl's death, we have nothing to do with allowances, or the series of enactments upon that subject; but the whole question must be determined upon the property, real or personal, settled or not settled, which passed on the death of the second Earl."

If what passes is a leasehold interest in land, it cannot be pretended that, the leasehold interest only being valued for estate duty purposes, an allowance is to be made under this section for the value of the head-rent. To do so would be practically to allow such value twice over, it having been already taken into consideration in reducing the value of the land; and, for that reason, I hold that neither an ordinary head-rent, nor the annuity in the present case, is an incumbrance within the meaning of section 7.

(1) [1899] A. C. 198, at p. 205.

There is, however, one provision of the sub-section which is germane to the present case, the fifth:—"5. The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." This fifth sub-section is re-enacted by the Finance Act, 1910, with a proviso, inapplicable here, that no deduction is to be made in the estimate on account of the assumption that the whole property is to be placed on the market at one and the same time. This fifth sub-section is, in my opinion, that which rules the present case; and it is on that that the alternative estimate of the Commissioners of Inland Revenue, that relied on by the amendment, is based.

Mr. Henry has relied, in support of the respondent's contention, upon the provision of section 61, sub-sect. 2, of the Act of 1910, that where it is claimed that a fixed duty is payable, under section 16, sub-sect. 1, of the Act of 1894, as being property of a *gross* value not exceeding £300 or £500, as the case may be, and such property includes property which is proved, to the satisfaction of the Commissioners, to be subject to a charge created for the purpose of securing unpaid purchase-money, the value of the property, for the purpose of determining its *gross* value under that section, shall be taken to be its value, subject to the charge. This provision, he insists, would have been unnecessary, if the construction I have put upon the words "which passes on the death" be correct.

I cannot agree in this. The subject-matter of section 16, sub-sect. 1, of the Act of 1894 is small estates. In reference to these, sections 33, 35, and 36 of the Customs and Inland Revenue Act, 1881, made special provisions as to obtaining probate and reducing probate duty where the *gross* value of the estate did not exceed £300.

The Act of 1894, by its 16th section, sub-sect. 1, enacted that these sections of the Act of 1881 should apply where the *gross* value of the estate did not exceed £500. In the third sub-section of this Act the words occur "the *net* value of the property, real and personal, in respect of which estate duty is payable," thus forcibly contrasting *gross* value with *net* value;

K. B. Div. 1915.

INLAND REVENUE COMMRS. *v.* COOKMAN.

Palles C.B.

and the object of the sub-section relied on by Mr. Henry is to continue the benefits conferred by the Act of 1881, and to apply them to cases in which the *gross* value, as distinguished from the *net* value, had been increased by the purchase of property which had not been wholly paid for. The *gross* value, as distinguished from the *net* value, is however, not that on which estate duty is assessed, where, as here, it exceeds £1000.

I am, therefore, of opinion that the contention of the respondent, and the first contention of the Commissioners to the extent, if at all, that it varies from their alternative contention, are both wrong, and that the referee ought to have fixed the principal value of that which passed at £800.

I desire to add that, in my opinion, the argument for the respondent has been based upon a capital fallacy as to the real interest acquired by a tenant purchasing under the Land Purchase Acts. That interest is not the value of the fee-simple after deducting simply the amount of the Land Commissioners' advance. In addition, the purchaser acquired the right that the advance should be repaid by instalments payable over a long series of years, such instalments being calculated at a rate of interest much lower than that at which such purchaser, or any one of the public, could obtain the same. This right, which may be taken to be an addition to the Land Commission annuity of an annual sum, to be continued so long as the annuity continued, and to be of an amount equal to the difference between the actual annuity and the annuity for the same period of years for which an ordinary banker or money-lender would have made the advance, constitutes an interest in the land, and is a free gift by the nation to the purchaser. As an annuity, however, this interest would cease on the redemption by the purchaser of the Land Commission annuity, as such redemption is, in fact, a renunciation by the purchaser of continuing to retain the loan on the Government terms, and a consequent loss of the advantage, so far as, at the time of the redemption, that advantage was prospective.

The referee's calculation deducts from the value of the fee-simple the redemption price of the annuity. This, however, is too great a reduction, and, consequently, leaves the difference

(taken to represent the capital value of the lands assessable to duty) too small. The reduction is too great, because it includes in it part of the nation's free gift to the purchaser. This difference would be very small were the annuity one which had but a few years to run; but, in a case like the present, it would be very large. I do not say that it would wholly account for the difference in the present case between the sums arrived at by the two different calculations—£800 and £359 2*s.* 5*d.*—because elements such as supply and demand affect market value, which is represented by the £800. In addition, we know that the sum of the values of a lease and the reversion in fee, in some counties in Ireland, exceeds the value of the fee-simple in possession of the same lands, free from any tenancy.

We must allow the appeal, and declare the capital value of the lands for the purpose of estate duty to be £800. Each party must abide their own costs of this appeal. The contention of the Commissioners upon which they succeed was not put forward until the amendment was made during the present hearing. The case of each party, as put before the referee, was unsustainable.

Solicitor for the petitioners: *The Solicitor of Inland Revenue.*
Solicitors for the respondent: *John A. Sinnott & Co.*

C. L.

K. B. Div.
1914.
Nov. 16.

THE KING (PATTERSON) *v.* THE JUSTICES OF TYRONE (1).

Justices—Summons under Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 156 (*a*), *charging that the Defendant did "buy, detain, or receive Military-Property"—Conviction General—One Offence—Award of Penal Sum of over £5—Imprisonment directed without first directing Distress—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *ss.* 22, 23—*Certiorari.*

A summons under the Army Act, 1881 (44 & 45 Vict. c. 58), sect. 156, sub-sect. (*a*), which charges that the defendant did unlawfully "buy, detain, or receive from soldiers, or other persons acting on their behalf," military property, does not charge several offences, but one offence, under the statute, and a general conviction on such summons is not bad for uncertainty.

A conviction by justices under the Petty Sessions (Ireland) Act, 1851, imposing a fine exceeding £5, and directing imprisonment in default of payment, without first ordering a distress or setting out grounds justifying a distress being dispensed with, is bad.

If the justices hold that a defendant has no sufficient goods for a distress, that fact must be judicially determined by them, and must be set out on the face of the order.

CERTIORARI.

Motion, served by leave of the Court, for an absolute order for a writ of certiorari to be directed to the justices of the peace in and for the county of Tyrone to remove into the King's Bench Division for the purpose of being quashed the records of a conviction made by the justices on the 12th October, 1914, at Omagh petty sessions, against James Pine Patterson, upon a complaint by the King, at the prosecution of B. Conlin, D.I.R.I.C., against James Pine Patterson.

On the 9th October, 1914, Mr. Conlin, District Inspector of the Royal Irish Constabulary, took out a summons against James Pine Patterson, of Omagh, charging that Patterson "on divers

(1) Before PALLES C.B. and BOYD and DODD JJ.

dates between the 5th day of August, 1914, and the 8th day of October, 1914, at Omagh, did unlawfully buy, detain, or receive from soldiers or other persons acting on their behalf various articles of military clothing and a blanket, the property of His Majesty's Government, contrary to the provisions of the Army Act, 1881 (44 & 45 Vict. c. 58), sect. 156."

The summons was heard at Omagh petty sessions on the 12th October, when Mr. Conlin appeared to prosecute. On behalf of the prosecution Head Constable Empey, R.I.C., deposed that on the 29th September, 1914, in consequence of complaints made to him, he entered Patterson's house, a lodging-house in Omagh, and on entering found a bundle of khaki clothes; that Patterson, in answer to the deponent's inquiry, stated that a soldier, called O'Hara, had come to the house the previous night bringing with him civilian clothes, and had changed from his uniform into the civilian clothes, and had given his uniform to him, Patterson, stating that he, the soldier, was going to see friends in Cavan, and would return the following day. Empey further deposed that on visiting Patterson's house on the 29th September, 1914, he took possession of the khaki clothes, which consisted of a uniform tunic, cap, breeches, puttees, and boots.

Empey further deposed to another visit to Patterson's house on the 8th October following, when he, Empey, found on Patterson's premises five pairs of military socks, six pairs of military drawers, three military shirts, and a military blanket, some of these articles being stamped with the brand of the War Department, and others marked with soldiers' private marks, and that on inquiry Patterson stated that he had bought these articles from women about the town, and had never noticed the marks or brands, being ignorant that these articles were military property. The articles were taken possession of by the head constable. Quartermaster-sergeant Creighton, in charge of stores at Omagh depôt, deposed that the articles found at Patterson's were the property of the War Department, and had been recently issued to troops; that no person had received permission to sell these articles, and that their value was £1 18*s*.

Patterson gave evidence in his own defence, and stated that he had bought the articles from men who had come to Omagh

K. B. Div. 1914.

REX (PATTERSON) v. JUSTICES OF TYRONE.

from England and Scotland; he admitted that the name of the soldier who came to his house on the 29th September, 1914, was, not O'Hara, as he had stated to Empey, but was another name, which name he admitted was written inside the uniform cap taken by Empey. On cross-examination Patterson admitted that he had purchased workhouse clothing from paupers; that he had been convicted of receiving stolen goods; and that when fined £12 10*s.* for illegally keeping a pawn-office he had been unable to find the money for the fine, and had consequently been imprisoned in default of payment.

The material portions of the conviction, as set out in the certificate, were as follows:—"I certify that upon the hearing of a complaint that the defendant on divers dates between the 5th day of August, 1914, and the 8th day of October, 1914, at Omagh, did unlawfully buy, detain, or receive from soldiers, or other persons acting on their behalf, various articles of military clothing and a blanket, the property of His Majesty's Government, an order was made on the 12th day of October, 1914, by the justices present, against James P. Patterson, of Omagh, to the following effect, viz., defendant duly convicted and ordered to pay for fine the sum of £10, and for costs the sum of 1*s.* 6*d.* forthwith, and in default of payment to be imprisoned in Londonderry jail for the period of three calendar months, unless said sums be sooner paid."

Patterson, in his affidavit upon which the application was grounded, alleged that no proof had been given at the hearing that he had bought, detained, or received from any particular soldier the articles mentioned in the summons, nor any proof except of his possession of these articles, and that the charges made in the summons were in the alternative. Patterson further alleged that, being desirous of appealing to the quarter sessions to be held on the 21st October, 1914, he had served notice of intention to appeal on Mr. Conlin on the 14th October, 1914, and had lodged the £10 and 1*s.* 6*d.* costs, and entered into the required recognisance, but that on the hearing of the appeal the Court, on objection taken that the notice had not been served seven clear days before the quarter sessions, had decided that there was no jurisdiction to hear the appeal.

The following are the material portions of sect. 156 of the Army Act, 1881, under which the prosecution was brought:—

Sub-sect. 1—Every person who (*a*) buys, exchanges, takes in pawn, detains, or receives from a soldier or any person acting on his behalf, on any pretence whatsoever . . . any of the property following, namely, any arms, ammunition, equipments, instruments, regimental necessaries, or clothing, or any military decorations of an officer or soldier, or any furniture, bedding, blankets, sheets, utensils, and stores in regimental charge . . . shall, unless he proves either that he acted in ignorance of the same being such property as aforesaid or of the person with whom he dealt being or acting for a soldier, or that the same was sold by order of a Secretary of State or some competent military authority, be liable, on summary conviction, in the case of the first offence, to a fine not exceeding £20, together with treble the value of any property of which such offender has become possessed by means of his offence."

Murnaghan, for the prosecutor:—

The order of conviction is bad. The summons, which is recited in the conviction, charges several offences; the conviction only finds the defendant guilty generally. It does not specify whether the defendant was found guilty of buying, or detaining, or receiving military property from a soldier, or from a person or persons acting on behalf of a soldier. The offences alleged in the summons are several, and they are stated disjunctively; consequently the conviction being general is uncertain, and therefore bad: *Ex parte Stephens*, *per* Palles C.B. (1); *R.* (*Vaughey*) v. *Meath Justices* (2); *R.* (*Neely*) v. *Down Justices* (3).

The order is also bad in directing imprisonment without directing that the imprisonment should be in default of distress. Offences under the Army Act, 1881 (44 & 45 Vict. c. 58), must be prosecuted, outside the Dublin metropolitan area, under the procedure provided by the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), and the Acts amending that statute: Army Act, 1881 (44 & 45 Vict. c. 58), sect. 166; Interpretation Act,

(1) Judgments of Superior Courts in Ireland, 297, at p. 312.
(2) 38 I. L. T. R. 12.
(3) 42 I. L. T. R. 111.

K. B. Div. 1914.

REX (PATTERSON) v. JUSTICES OF TYRONE.

1889 (52 & 53 Vict. c. 63), sect. 13 (10). As a consequence, the provisions of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), and of the Small Penalties (Ireland) Act, 1873 (36 & 37 Vict. c. 82), regulated the procedure of the justices in this case. The effect of the two last-mentioned statutes is, that in the case of an offence when the justices award a penal sum exceeding £5, they cannot by their order direct imprisonment except in default of distress, unless the particular case comes within the exception stated in sect. 22, sub-s. 3, of the Petty Sessions (Ireland) Act, 1851, where "the person directed to pay the penalty shall admit, or it be otherwise proved on oath, that he has no goods, or that a distress would be ruinous to him or his family." The exceptions specially enacted are matters precedent to jurisdiction. As such they must, where found to exist, be stated in the justices' order. Here there is no finding stated in the justices' order that Patterson had no goods, or that a distress would be ruinous to him or his family; the order, on its face, dealing with an ordinary case of offence, directs imprisonment without first directing distress, as is requisite in the ordinary case where a penal sum is awarded. As the order stands no justice could issue the "proper" warrant under sect. 23 of the Petty Sessions (Ireland) Act, 1851.

The Solicitor-General (*James O'Connor K.C.*), and *Rearden*, for the Crown:—

The first objection taken to the conviction is of no substance. The summons follows the words of sect. 156 (*a*) of the Army Act, 1881 (44 & 45 Vict. c. 58); and that section and paragraph describe one offence which can be committed in several modes. The unlawful obtaining of military property is the real offence with which sect. 156 (*a*) deals, and that was the offence with which Patterson was charged, and of which he was found guilty.

Even if the first objection is well grounded, it does not entitle the defendant to obtain from this Court an order for a writ of certiorari. The principles laid down by this Court in the cases of *R.* (*M'Swiggan*) v. *Justices of Londonderry* (1), *R.* (*Athy U.D.C.*) v. *Justices of Kildare* (2), and *R.* (*Sheehan*) v. *Justices of Water-*

(1) [1905] 2 I. R. 318. (2) [1912] 2 I. R. 64.

ford (1), apply to the circumstances of the present case, and the application of Patterson should, on those principles, be refused.

As to the second point, it is clear that the justices did satisfy themselves that Patterson would be unable to pay the fine, and that a distress would be useless. On those findings the justices had jurisdiction to order as they did.

PALLES C.B.:—

There are two points to be decided in this case; the first, to a certain extent, may be called a point on the merits; the second is a very technical point.

The first point arises on the allegation that in the summons more than one offence is included. That depends upon the construction of sub-s. 1 of sect. 156 of the Army Act, 1881 (44 & 45 Vict. c. 58). In answer to this point the learned Solicitor-General, while insisting that it was of no substance, also relied upon *The King* (*Athy Urban District Council*) v. *Justices of Kildare* (2). In my opinion it is not necessary to rest the answer to this point upon that case, because there is nothing uncertain in the allegation in this summons. When we read the section in question, which enacts that if any person shall receive from a soldier, or a person acting for a soldier, military clothing, whether he receives the same by purchase, pawn, exchange, or by any other means, that person (unless he proves the matter of exception provided by the section) is guilty of an offence, we see that the three matters stated in this summons, *i.e.* the purchase, detention, and receipt, all describe the same one offence. On that ground, the first point taken by Mr. Murnaghan in the course of his able argument cannot prevail.

The second point is one of a different description. This case was one in which the justices had jurisdiction to impose a fine of £10. Under the statute, for the purpose of recovering that £10, they had the right to direct the issue of a warrant for distress, and, in default of distress, they had authority to award imprisonment. In fact, what they did was to direct imprisonment in default of payment of the penalty. I have struggled to see

(1) [1914] 2 I. R. 178. (2) [1912] 2 I. R. 64.

K. B. Div. 1914.

REX (PATTERSON) v. JUSTICES OF TYRONE.

Palles C.B.

whether I could support their order by holding that it means imprisonment in default of distress. I cannot so read it. The order plainly intended that unless payment of the penalty was made, the defendant should be imprisoned. In my opinion, that order was illegal; and I cannot hold that the prosecutor here was bound to wait until he was actually imprisoned under that order, and then apply for a writ of habeas corpus as well as for a writ of certiorari to quash that order.

I turn to the 23rd sect. of the Petty Sessions (Ireland) Act, 1881 (14 & 15 Vict. c. 93), which enacts:—"In all cases of summary jurisdiction, whenever an order shall be made upon the conviction of any person for an offence, the justices shall issue the proper warrant for its execution forthwith." I read the words "proper warrant" to mean the warrant directed by the conviction, and on an order directing the warrant of imprisonment to issue on the non-payment of the penalty, the justices could not issue a warrant for distress and in default of distress for imprisonment. Therefore, with very great reluctance, I am obliged to yield to Mr. Murnaghan's argument upon this point, and to hold that the conditional order must be made absolute upon this second ground.

I should like to add that if the justices in any case hold that a defendant has no sufficient goods for a distress, that fact must be judicially determined, and must be set out on the face of their order.

BOYD and DODD JJ. concurred.

Solicitor for the prosecutor: *Alexander E. Donnelly.*
Solicitor for the Crown: *Sir Malachy Kelly.*

C. N. K.

CONLIN, APPELLANT; PATTERSON, RESPONDENT (1). *K. B. Div.* 1915.

Jan. 25, 26. Feb. 25.

Justices — Jurisdiction — Certiorari — Conviction quashed — Accused again charged with Same Offence — Res Judicata — Maxim, "Nemo debet bis vexari pro eadem causa"*— Right of Unsuccessful Prosecutor to have a Case Stated.*

Where a conviction by justices is quashed on certiorari on the ground that it is bad on its face by reason of the sentence pronounced being one which the justices had no jurisdiction to award, the case is to be treated as if the conviction had not been made. The accused may be put on trial again on the same charge, and he cannot successfully avail himself of the objection of *autrefois convict* or *autrefois acquit*, either of which must have for its basis an adjudication in fact within jurisdiction.

P. was convicted by justices at petty sessions of an offence within their summary jurisdiction, and ordered to pay a fine of £10, and, in default, to be imprisoned for three months unless the fine should be sooner paid. The conviction was quashed on certiorari on the ground that an order of imprisonment had been made without ordering first a distress. P. was subsequently prosecuted before the justices for the same offence, when the justices, being of opinion that the matter was *res judicata*, dismissed the summons, but stated a case for the opinion of the Court as to whether they were right in law in so doing.

Held, that the justices were not right in law, and that the matter should be remitted to them to proceed according to law.

CASE STATED by justices under 20 & 21 Vict. c. 43.

At a petty sessions held at Omagh on the 4th January, 1915, the appellant, a district inspector of police, charged the respondent, a second-hand clothes dealer, that on divers dates between the 5th August, 1914, and the 8th October, 1914, he did unlawfully buy, detain, or receive from soldiers, or other persons acting on their behalf, various articles of military clothing, and a blanket, the property of His Majesty's Government, contrary to the provisions of the Army Act, 1881 (44 & 45 Vict. c. 58), s. 156. It was admitted that the present proceedings were brought in respect of an offence which was the subject of

(1) Before PALLES C.B. and GIBSON and DODD JJ.

K. B. Div. 1915. CONLIN v. PATTERSON.

investigation before the justices on the 12th October, 1914, and in respect of which they convicted the defendant. The order of conviction was in the following terms:—"Defendant duly convicted and ordered to pay for fine the sum of £10, and for costs the sum of 1*s.* 6*d.* forthwith, and in default of payment to be imprisoned in Londonderry jail for the period of three calendar months, unless said sums be sooner paid."

The defendant moved for a writ of certiorari to remove this conviction into the King's Bench Division for the purpose of being quashed, and the conviction was quashed by the King's Bench Division on November 16th, 1914, on the ground that the order of imprisonment was made without ordering a distress of the defendant's goods in default of payment of the fine, or setting out on the face of the order grounds which would have justified a distress being dispensed with. See *Rex* (*Patterson*) v. *Justices of Tyrone* (1).

The justices were of opinion that, having regard to the former conviction and the order quashing same, the contention of the defendant, namely, that the matter was *res judicata*, was correct, and upon that ground they dismissed the summons. They did not, under the circumstances, consider it necessary to take evidence. The justices stated the present case on the application of the complainant, who was dissatisfied with their determination, and the opinion of the Court was sought as to whether they were right in law in so dismissing the summons.

The Solicitor-General (*O'Connor K.C.*) (with him *Rearden*) for the appellant:—

The doctrine *Nemo debet bis vexari pro una et eadem causa*, upon which the defendant relies, has no application to the case. That doctrine is a common law doctrine founded upon natural justice, and its application is the same in summary cases as in indictable cases: *Wemyss* v. *Hopkins* (2); *R.* v. *Marsham* (3). The phrase "in peril" is apt to lead to confusion, because, as used in relation to this doctrine, it cannot be taken literally. If taken literally, it would mean that any person who is properly charged before a Court upon a charge with which the Court is competent

(1) *Ante*, p. 162. (2) L. R. 10 Q. B. 378. (3) [1912] 2 K. B. 362.

to deal, would be able to plead *autrefois acquit*, or *autrefois convict*, whatever the result of the proceedings; and this is obviously not so, *e.g.*, take the case of a disagreement of a jury, or a bench of magistrates being equally divided. In order to sustain the plea there must be a judgment of the Court: *Burgess* v. *Boetefeur* (1). If a judgment of acquittal be relied upon, it must be a judgment of acquittal by a Court competent to decide the case upon the merits: *The King* v. *Taylor* (2); Russell on Crimes, 7th ed., p. 1983. If a judgment of conviction, it must be a conviction which is capable of being enforced, or which at any rate stands unreversed. The plea *autrefois convict* relies not alone upon the fact of conviction, but that the conviction stands valid and unreversed: Archbold, 20th ed., p. 153. The law, in the case of indictments, is perfectly settled. If a defendant is convicted, and the judgment is wrong and therefore cannot be enforced, and the conviction is subsequently set aside upon a writ of error, the defendant can be again charged with the same offence: *R.* v. *Drury* (3); see also *Vaux's Case* (4). This question has always been treated, in the case of indictments, as settled. (See 2nd Hale P.C., ch. xxxii, pp. 243, 248, 251; 2nd Hawk P.C., ch. ii, c. 36, c. 50, s. 18; Hayes's Criminal Law, p. 237; Gabbett's Criminal Law, pp. 579, 580; Russell on Crimes, 7th ed., p. 1982, *et seq.*) *A fortiori*, if a magistrate's conviction is quashed upon certiorari the prisoner can be again impleaded. The conviction which is bad upon its face is absolutely void, and, apart from statute, affords no protection whatever to a person acting under it: *Newman* v. *Bendyshe* (5); *Griffith* v. *Harries* (6). The effect of quashing a conviction upon certiorari is to wipe out all evidence of the erroneous conviction, and to declare void that which was void *ab initio*: *R.* (*Mulgrew*) v. *Commissioners of Inland Revenue* (7). The limited application of the rule is seen in *R.* v. *Marsham* (8) and *R.* v. *Simpson* (9). *The King* v. *Clare Justices* (10) supports our contention.

(1) 7 M. & G., at pp. 504, 509.
(2) 3 B. & C. 502.
(3) 3 Cox, 544.
(4) 4 Co. Rep. 44.
(5) 10 A. & E. 11.
(6) 2 M. & W. 335.
(7) 35 I. L. T. R. 157.
(8) [1912] 2 K. B. 362.
(9) [1914] 1 K. B. 66.
(10) [1905] 2 I. R. 510.

K. B. Div.
1915.
CONLIN
v.
PATTERSON.

The Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2, allows either party to the proceedings to apply to have a case stated.

Murnaghan, for the respondent :—

The justices having dismissed the summons, there is no appeal by way of case stated. A prosecutor who sets the law in motion on information or complaint, and who fails to secure a conviction, is not a person "dissatisfied" within the meaning of 20 & 21 Vict. c. 43, s. 2: *The Queen* v. *London Justices* (1). In *Foss* v. *Best* (2) doubt was entertained as to whether there was jurisdiction to entertain a case stated from a dismiss. In *Davys* v. *Douglas* (3), however, it was decided that there was an appeal from a dismiss, as well as from a conviction.

Secondly, there is no precedent of a summons having been brought successfully in respect of an offence upon which an order of conviction had been made by justices and such order had been subsequently quashed on certiorari. The decision in *R.* v. *Drury* (4) is based upon the procedure of the Common Law Courts in trials on indictment, and the writ of error is a proceeding in the same Court which tries the offence, in order to rectify its own record. This Court, by the exercise of its prerogative writ, puts an end to all proceedings before the justices. The origin and the whole exercise of the prerogative power of quashing orders and convictions of an inferior Court rests on that Court having exceeded its jurisdiction: *In re Heaphy* (5), per Palles C.B., at p. 511. Owing to the statute 11 & 12 Vict. c. 78, s. 5, which enabled the Court for Crown Cases Reserved to substitute a proper sentence, it never became necessary to consider the decision in *R.* v. *Drury* (4), which was pronounced after that Act had been passed: See *Drury* v. *The Queen* (6).

Thirdly, it is submitted that, in any event, the order of this Court quashing the conviction is a constructive acquittal. By constitutional practice a person impleaded before a Court must be

(1) 25 Q. B. D. 357.
(2) [1906] 2 K. B. 105.
(3) 4 H. & N. 180.
(4) 3 Cox, 544.
(5) 22 L. R. Ir. 500.
(6) 3 Cox, 252.

declared either guilty or innocent. The conviction of the defendant here has been set aside, and that is tantamount to an acquittal. The Court of Criminal Appeal in England is directed by the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4, sub-s. 2, to enter a verdict of acquittal when it quashes an improper order of conviction, and that provision of the Act of 1907 is simply declaratory of the common law.

Further, a person is in peril if summoned on a proper charge before a Court having jurisdiction to hear the case. The argument for the Crown is that a person is never in peril until he has been convicted on an order not liable to be quashed on certiorari; but on this view a person who has been acquitted was never in peril. If a person has been acquitted, this Court will not quash the acquittal, even though the tribunal was biassed: *R.* (*Hastings*) v. *Galway Justices* (1). In that case Palles C.B. says, at p. 505: "The binding effect of an acquittal depends upon the essential principle of English law, that in a criminal proceeding 'the defendant ought not twice to be put *in peril* for the same cause'—a principle which has been acted upon as far back as our records extend." [He also referred to *Rex* v. *Simpson* (2); *The Queen* v. *Miles* (3); *Ryley* v. *Brown* (4).]

Rearden, in reply.

Cur. adv. vult.

Feb. 25.

PALLES C.B.:—

The question here is whether the justices were right in dismissing the complainant on the allegation that the matter was *res judicata*. The respondent had been previously convicted by justices on a summons charging him with an offence in the same words as that charged in the later summons, and upon it the justices had pronounced a sentence which they had not jurisdiction to award. This conviction was upon that ground quashed by this Court on certiorari. There was also a suggestion that the summons charged cumulative offences, but this objection was decided in favour of the Crown upon the application for the certiorari. No doubt it is still open to the applicant here to insist

(1) [1906] 2 I. R. 499.
(2) [1914] 1 K. B. 66.
(3) 24 Q. B. D. 423.
(4) 54 J. P. 486.

K. B. Div. 1915.

CONLIN v. PATTERSON.

Palles C.B.

that the offences are in law separate, and, if they are, it must be assumed that the decision was on that ground also, but this does not assist the applicant here, as the same considerations arise whether both objections to the conviction were, or either was, valid.

The sentence was part of the conviction, and by reason of its being in excess of the justices' power, by reason of either or both of the objections, the entire order of the justices (that is the adjudication of guilt and sentence) was quashed, as being null and void *ab initio*, and removed from the record of the justices' proceedings. In event, therefore, the case is to be treated as if the order had not been made. There has not, therefore, been any order, and consequently there cannot be any objection to the present proceeding in the nature of *autrefois convict*, or *autrefois acquit*, each of which must have for its basis an adjudication in fact within jurisdiction, for an adjudication in excess of jurisdiction is not an adjudication at all.

Mr. Murnaghan (who has argued the case most ably) relies on the order quashing the former conviction as an acquittal. In my opinion this argument is grounded upon an erroneous view of the jurisdiction of this Court in relation to Courts of inferior criminal jurisdiction. There is no appeal from the decision of justices to this Court. The appeal is to Quarter Sessions. Neither is there any jurisdiction in this Court to consider, on certiorari, whether there was before the justices sufficient evidence of guilt, save in one case, viz., where the records set out the evidence (*Walsall* v. *London and North-Western Railway Co.* (1)), which no longer is necessary.

The jurisdiction of this Court on certiorari is, under its common law superintendence of inferior Courts, its right to keep all those Courts within the limits of their jurisdiction; and as those Courts exceed their jurisdiction if they depart from their prescribed course in many matters of form, and also if it appears on the record that they convicted without sufficient evidence of guilt, this Court will, in such a case, declare void the conviction on which there is such error of form, or in which it appears that there was not sufficient evidence of guilt.

(1) 4 A. C. 30.

The matter examinable, however, by the Court differs in each class of case. Where the evidence is set out, the Court has jurisdiction, and an obligation, to examine it, and to determine whether it is sufficient evidence of guilt, and, if it comes to a conclusion on that matter in the negative, to quash the conviction upon the ground that the defendant has not been proved guilty, or, in other words, that he is not guilty. I should be prepared to hold that such a determination is equivalent to an acquittal, and would be the basis of a good plea of *autrefois acquit*.

It is different, however, when a conviction is quashed on certiorari on a matter of form which has ousted the jurisdiction of the inferior Court. In such a case the jurisdiction of the King's Bench is limited to determine whether the error in form is such as to oust the jurisdiction of the inferior Court. It has not before it the materials to determine guilt or innocence, and has no jurisdiction to do so. It is limited to determine whether the jurisdiction has been exceeded, not how, had the matter been within jurisdiction, that jurisdiction should have been exercised. The latter is a matter of appeal; and, as I have said, this Court is not a Court of Appeal from justices' decisions. In such cases, therefore, of which this is one, there cannot be an adjudication, or even a consideration, of guilt or innocence. In the present case, therefore, the order quashing the previous conviction cannot amount to an acquittal.

The case must go back to the justices with the opinion of the Court that their decision was wrong in law, and a direction to proceed to hear the case. With regard to the allegation that the charge in the summons involved separate offences charged alternatively, without expressing any opinion upon the question, it will, I think, be right to state on our order that the statement of the case, and our order thereon, are not to be deemed to prejudice or affect the complainant's right to apply to amend the charge in the summons under the Petty Sessions Act. In my opinion, the case is not one for costs.

GIBSON J. concurred.

DODD J.:

James Pine Patterson was brought by the district inspector of police before the petty sessions at Omagh on the 12th October,

K. B. Div. 1915.

CONLIN v. PATTERSON.

Dodd J.

1914, charged with an offence under the Army Act, 1881, that he did unlawfully buy, detain, or receive from soldiers, or other persons acting on their behalf, various articles of military clothing, and a blanket, the property of His Majesty's Government.

The justices on that date made an order as follows:—"Defendant duly convicted and ordered to pay for fine the sum of ten shillings, and for costs the sum of one shilling and sixpence forthwith, *and in default of payment to be imprisoned in Londonderry jail for the period of three calendar months, unless said sums be sooner paid.*"

This order was brought before this Court, and by order dated the 16th November, 1914, was quashed. What the order of this Court did was to pronounce that the order of the justices was made without jurisdiction, and was therefore void. In effect the order was erased from the petty sessions book. The ground of the decision was that, though the justices had jurisdiction to hear and determine a complaint, such as that formulated in the summons, they had no jurisdiction to imprison as in the order made.

The district inspector thereupon brought a fresh summons, designedly it would seem in the identical words of the first summons, and this came on to be heard before the magistrates at Omagh on the 4th of January, 1915. The justices were of opinion that the matter was *res judicata*, and upon that ground dismissed the summons. The matter for our consideration is, were they right in dismissing the summons?

The discussion has covered a wide field, and has turned largely upon phrases: "*Nemo debet bis vexari*"; "A man is not to be put twice in peril." Then some tests are quoted as being determining tests whether a man has been put in peril. Whereupon the phrase "on the merits" comes in for consideration. These phrases are illuminating phrases, but they are capable of being turned round so as to cease to be illuminating, and to become misleading.

I do not think the case before us calls for a general discussion or exposition of this doctrine of our jurisprudence. It is a matter of interest in the criminal history of our country. This doctrine has been a shield and protection to the people in a time of stress, and

especially in the time of the Stuart Kings. The phrase in Scotland is: "he has tholed his assize." A person who had "tholed his assize" was freed from further prosecution, or persecution, for the same offence. And I, for one, have no desire either to invade or evade that principle so eminently in accordance with the natural sense of justice.

In the Courts of Assize the determination of the question whether the accused was or was not previously convicted, or previously acquitted "on the merits," is complicated by our scientific, if cumbrous, system of pleadings, and by various other intricacies of legal procedure. I do not stop to inquire how far I am bound by decisions on that branch of the subject, or whether I could adopt some of the decisions cited, which seem to me to be rather against the liberty of the subject. I think the question before us can be determined in a simple way.

By reason of various decisions it is now pretty well established that this Court cannot review the orders of justices at petty sessions, if they are good on the face of them and if they are within the jurisdiction of the justices, at any rate *on certiorari*. But the Court can deal with any order that is bad on the face of it, and is *thus* shown to be without jurisdiction. That is what was done here. And that puts an end to the order. This Court declares that what purports to be an order is no order. It has no validity.

But Mr. Murnaghan argues that the justices had jurisdiction to hear, and to decide that the accused was guilty of the offence charged, and to order him to pay a fine. It was only in *the sentence* that jurisdiction was over-stepped. And it is in this connexion that he relies upon the authority of decisions in the Courts of Assize.

This Court has no power, under the procedure adopted by the accused, to sever a good part from a bad part of an order. Under the procedure on a case stated such jurisdiction does attach to this Court. The accused here called the Court to his aid by certiorari, and not by way of case stated. The result is, as his legal advisers well knew, the whole order must go. We could not leave him liable to the fine, while relieving him of the imprisonment. I do not say he was not within his rights in doing all he could to

K. B. Div. 1915.

CONLIN v. PATTERSON.

Dodd J.

escape the consequences of his acts. But he has in so doing got himself involved in wire entanglements.

To say that a matter is *res judicata* is to say that there has been already a judicial decision.

What was the decision? Was the accused convicted or acquitted? Mr. Murnaghan first says he was convicted—by the justices. But that conviction has been declared by this Court no conviction. He then says he was acquitted by this Court. But this Court has no jurisdiction either to convict or acquit.

He then falls back upon his reserves, and says it is unprecedented for the Crown to proceed afresh after proceedings that terminate in the discharge of the accused. The cases which turn upon whether the acquittal was "*on the merits*" or not show that this proposition is too wide. He then says it is unusual. I think he is right in that. And for this a reason may be found. A maxim such as *nemo debet bis vexari* is one apt to be applied *de facto*, even when it is not strictly applicable *de jure*. If a man has been "discharged" on any ground, as the law is now administered, the Executive as a rule proceeds no further. There is a change in the *attitude* towards the law rather than in the law itself, since the Stuart period. The genius of our law is against the Crown having a "second hop" at an offender—a phrase of Lord Justice FitzGibbon. It is part of that "sportsmanlike" character which is so much the subject of discussion at present. The fox who has run to earth has earned his life. But for so mean and unpatriotic an offence as that charged against the accused, the strictest jurist for fair play or sportsmanlike conduct would be the first to proclaim that the military authorities were within their rights in putting in force any remedy that the law permits. That the law does permit the remedy is, I think, free from doubt.

May I add that I gratefully and cordially concur in the judgment of the Lord Chief Baron? It illuminates, by contrast, the essential justness of the decision which, as I understand, now becomes the decision of the Court, while safe-guarding it from being misunderstood or misapplied.

The result will be that the answer to the question put to us by the justices will be that the matter was not *res judicata*, as they

erroneously supposed, and that the case will be sent back to them to do as to justice shall appertain.

Solicitor for the appellant: *Sir Malachy Kelly.*
Solicitor for respondent: *A. E. Donnelly.*

C. L.

K. B. Div. 1915.

Feb. 2.

DEVANEY, Appellant; FIELD, Respondent (1).

Justices—Summary Jurisdiction—Unmuzzled Dog on Public Road—Dangerous Dog—Summary Jurisdiction (Ireland) Act, 1851 (14 & 15 *Vict. c.* 92), *s.* 10, *sub-s.* 7.

By s. 10, sub-s. 7, of the Summary Jurisdiction (Ireland) Act, 1851, any person who keeps or suffers to be at large within fifty yards of any public road any dog, without having such dog muzzled, or without having a block of wood fastened to the neck of such dog of sufficient weight to prevent such dog from being dangerous, is made liable to a fine.

On the hearing of a summons brought against F. under the sub-section, it appeared that F. had allowed a dog, not a dangerous dog, to be at large on the public road, unmuzzled and without a log. The magistrate dismissed the summons.

Held, that the magistrate was right in his decision, on the ground, *per* Cherry L.C.J. and Molony J., that the sub-sect. did not apply to the case of a dog *on* the public road; *per* Madden J., that it applied to dangerous dogs only.

Case Stated, under 20 & 21 Vict. c. 43.

At a sitting of the Dublin Metropolitan Police Court, holden in and for said police district on the 26th November, 1914, before Mr. Swifte, the divisional justice acting in and for the said district, the respondent was charged as defendant, in a certain summons in which the appellant was complainant, for that he "on the 13th day of November, 1914, at Anglesea Street, within the said district, did suffer to be at large, within fifty yards of the public road, a dog, without having such dog muzzled, or without having a block of wood fastened to the neck of such dog of sufficient weight to prevent such dog from being dangerous, contrary to the form of the statute in such case made and provided (Summary Jurisdiction (Ireland) Act, 1851, sect. 10, sub-s. 7)." The summons was heard by the divisional justice, the complainant being then present, and the defendant not

(1) Before Cherry L.C.J. and Madden and Molony JJ.

appearing though duly summoned. In support of the charge the complainant deposed:—"On the 13th November, defendant allowed a dog, his property, to roam at large on the public thoroughfare at Anglesea Street, without log or muzzle. The dog was apparently harmless, and was about 100 yards from defendant's house. It is an Airedale terrier. I followed the dog to defendant's residence. I knew the dog and defendant for years."

The divisional justice dismissed the summons on the ground that the sub-section did not apply to a dog found at large on the public road, unlogged and unmuzzled. On the requisition of the complainant he stated the present case, seeking the opinion of the Court as to whether he was correct in point of law in his decision.

Rearden for the appellant:—

Section 10, sub-sect. 7, of the Summary Jurisdiction Act, 1851, makes it an offence to keep or suffer to be at large within fifty yards of any public road *any* dog without having such dog muzzled or without having a block of wood fastened to the neck of such dog, of sufficient weight to prevent such dog from being dangerous. The words "any dog" cannot be read as meaning only "any dangerous dog," but must be read in their ordinary grammatical sense. That the Legislature intended these words to have their widest meaning is made clear by the fact that the same sub-section empowers justices to order *dangerous* dogs to be destroyed.

The offence is committed by keeping or suffering to be at large *on* the public road an unmuzzled dog.

The respondent did not appear.

CHERRY L.C.J.:—

In this case we are all of opinion that the decision of the magistrate was right. The defendant is charged, "that he did keep within fifty yards of a public road a dog without having such dog muzzled, or without having a block of wood fastened to the neck of such dog of sufficient weight to prevent such dog

K. B. Div. 1915.

DEVANEY v. FIELD.

Cherry L.C.J.

from being dangerous," under section 10, sub-sect. 7, of the Summary Jurisdiction Act, 1851.

The terms of that sub-section are confined to premises *near* a highway. The offence here was alleged to have been committed *on* the highway. It is important to look at the rest of the section, for a careful examination of its terms will show that a marked distinction is drawn in the various sub-sections between offences committed on the highway itself, and offences committed on premises immediately adjoining it. Several of the sub-sections deal with offences committed both *on* and *near* a public road or highway, others deal only with one or other of these offences. In sub-section 7 the words are "within fifty yards of any public road." Having regard to the language used in the other sub-sections it is to my mind clear that the offence under this sub-section is confined to the keeping of dogs on the premises of the persons charged immediately adjoining the highway, and does not extend to anything done on the highway itself. It is argued that the sub-section should be given a wider construction, inasmuch as it is more dangerous to have a dog on the road than in the house. But it is pointed out by Mr. Swifte in his judgment that there are other statutes dealing with the case of dangerous dogs being allowed to be on the highway itself. This sub-section does not apply to that case.

The decision of the police magistrate must be affirmed.

MADDEN J.:—

I agree that the decision of the chief magistrate is right, but I wish to make it clear that I do not rest my judgment on the same ground. I am clearly of opinion that the 7th sub-section relates to dangerous dogs, and to dangerous dogs only. I must have regard to what goes on in the world, and to the mischief against which the Legislature sought to protect the public. The whole of the 10th section of the statute is plainly designed for the protection of persons lawfully using public roads, or streets of towns, against danger or inconvenience. This intention is apparent in every sub-section. A dog that requires, for the protection of passers-by, either to be muzzled, or to have

a block of wood fastened to his neck of sufficient weight to prevent him from being dangerous, is the class of dog with which the sub-section is conversant, and no dog of this kind is to be at large within fifty yards of any public road without the means of protection for the public. A dog that is not dangerous is not a cause of danger or inconvenience to the persons using a public road. To apply the present sub-section to the case of such a dog is not only to violate the plainest rule of construction, but to attribute absolute absurdity to the Legislature. Is it to be imagined that the presence of a toy dog within fifty yards of a public road is to be considered unlawful unless the wretched animal is muzzled, or weighted with a heavy log of wood?

If there were any doubt about the application of the early part of the sub-section—and I can see none—its meaning would be rendered clear by what follows: A warrant may be issued to a constable directing him "to seize or kill any dangerous dog which shall be so kept near any public road contrary to the provisions of this Act." It is clear that the words "so kept" refer to the previous part of the section. You are not to have a dangerous dog near a public road without protection, and a warrant may be issued to kill a dangerous dog so kept.

The public road itself is, in my opinion, included in the words "within fifty yards of any public road." The expression is inaccurate, but, unless it is so understood, we must be prepared to attribute to the Legislature the further absurdity of prohibiting a dangerous dog to be at large in a garden adjoining a public road, but allowing it to be at large on the road itself. The sub-section might have been better expressed, but its meaning is to my mind sufficiently clear.

The order of the chief magistrate was, in my opinion, right.

MOLONY J.:—

I am quite satisfied that the decision of Mr. Swifte was right in point of law, and that no offence is committed under the sub-section where a dog is actually on the public road, as was proved in the present case.

Mr. Rearden contends that we must read the words "within

K. B. Div. 1915.

DEVANEY v. FIELD.

Molony J.

fifty yards of any public road" as meaning *on* any public road or within fifty yards from such road. There are five offences mentioned in the section which can be committed on a public road, and six which can be committed either on a public road or within a certain number of feet from the centre thereof. The Legislature had before its mind the two different classes of offences, and in the definition of the offence here in question it deliberately defined the offence as being capable of commission, not on, but within a certain defined distance from the public road. There is no justification for introducing into the definition of the offence words which are not to be found in the sub-section, and which would have the effect of unduly enlarging its scope. It is also to be noted that in the subsequent part of the same sub-section the offence is referred to as that of a dog being "so kept near any public road," which necessarily excludes the idea of the dog being actually on the public road at the time of the commission of the offence.

I am also inclined to agree with Mr. Justice Madden that the sub-section on its true construction applies only to dogs which would be actually dangerous if they were without a muzzle or without a block of wood of the kind, and fastened in the manner, contemplated by the statute. As, however, this point does not arise on the case, and was not fully argued, I prefer not to base my decision upon it.

Solicitor for the appellant:—*Sir Malachy Kelly.*

A. E. C.

NOTE.

The judgment of Mr. Swifte above referred to was delivered in another case heard by him some time before the present case, and depending upon similar facts. A copy of this judgment was annexed by him to the present case stated as showing the grounds of his decision. After stating the facts, the judgment proceeded as follows:—

The summons is brought under sub-s. 7 of s. 10 of the Summary Jurisdiction (Ireland) Act, which sub-s. is as follows:—s. 10 begins with a general enactment that "any person who shall commit any of the next following offences shall be liable to the punishment hereinafter specified in each case," and sub-s. 7 provides that "any person who shall keep or suffer to be at large within fifty yards of any public road any dog without having

such dog muzzled, or without having a block of wood fastened to the neck of such dog of sufficient weight to prevent such dog from being dangerous, shall be liable to a fine not exceeding ten shillings; and it shall be lawful for the justices of the petty sessions district to issue a warrant to any sub-inspector, head or other constable, directing him to seize or kill any *dangerous* dog which shall be *so kept near* any public road, contrary to the provisions of this Act, and such sub-inspector, head or other constable, may accordingly seize or kill any such dog."

The question I have to consider is whether a *non-dangerous* dog "at large" in a Dublin street comes within that sub-section.

It will be noted first of all that the sub-section does not, at any rate in terms, prohibit the dog from being "on" the public road, but "within fifty yards" of it. The significance of this omission becomes apparent by contrasting the 7th sub-s. with others in the same section. Thus, sub-s. 2 prohibits the throwing of fireworks or the discharge of any firearms "on" any public road or within sixty feet of the centre thereof." Sub-s. 4 prohibits (save as therein excepted) the slaughtering, &c., of any beast or the leaving any dead beast "*on* any public road or within 30 feet of the centre thereof." Sub-s. 5 prohibits, as therein, the laying of any stone, &c., "*on* any public road or within 30 feet of the centre thereof, or in any street of a town." Sub-s. 6 prohibits certain other offences "on any public road or street of a town, or within 30 feet of the centre thereof." Then comes sub-s. 7 that I have already read, which deliberately omits the word "on" before "public road," and also deliberately omits any provision that the "fifty yards" shall, as enacted in the immediately preceding sub-sections, be measured from the centre of the road. If it had been provided, without using the word "on," that the fifty yards were to be measured from the centre of the road, the dog's owner would apparently be liable if the dog were found on the portion of the road within the fifty yards' limit, but the language of sub-s. 7 seems to suggest that the "fifty yards" are to be measured on ground entirely *adjoining* the public road, and prima facie therefore constituting private property. The reference in the sub-section to keeping a dog seems to support this view. An owner could not well be said to "keep" his dog *on* the public road, and the area referred to is the same for the being "at large" as for the "keeping." Another strong argument, as it appears to me, is to be found in the words occurring later in the sub-section where it deals with the case of "dangerous" dogs, and empowers the police to seize or kill any dangerous dog "*so* kept" *near* any public road. If it be asked what the object of the sub-section is, I would reply that although, from the word "road" being interpreted in the definition section (s. 25) of the Act as including "highway or other public thoroughfare," the sub-section seems applicable to a Dublin street, still the reference to a sub-inspector, head or other constable, appears primarily applicable to the Royal Irish Constabulary, and the omission in sub-s. 7 of the words "or any street of a town," which occur in other sub-sections

K. B. Div. 1915.

DEVANEY v. FIELD,

immediately preceding, would suggest that sub-s. 7 was primarily intended to apply to rural or suburban districts where, say a postman, milkman, or other messenger, going up to a house within fifty yards of the road, might be liable to be attacked by a loose dog, unmuzzled and unlogged. Such a dog, on what may be called "his own territory," would be much more likely to attack a visitor than he would be to attack an ordinary wayfarer on the public road. Such a dog would, I think, not only "be at large," but he might also be "kept" within fifty yards of the public road. It is noticeable that the sub-section does not authorize the police to deal with a dog "at large" within the fifty yards' area, but only one "so kept."

It appears to me that a strict enforcement of the sub-section, as hitherto interpreted here, might almost amount to cruelty to dogs or, in the alternative, constitute a nuisance to their owners. According to that strict interpretation, a dog, however quiet or toothless, should never be let out of a house into the street even for a few moments, unless held by a string or otherwise under control—a condition which might be at least very irksome to his owner. What would be the alternative in houses or cottages possessing very small rear premises, or none at all? I leave that question to be answered by the sanitary authorities.

It will be noticed that I have carefully limited the foregoing observations to the case of inoffensive or non-dangerous dogs. There is plenty of legislation dealing with dangerous or ferocious dogs. Thus, as far back as seventy years ago, s. 14, sub-s. 2, of the Dublin Police Act of 1842 (5 Vict. c. 24, sess. 2) imposes a penalty up to 40*s.* on any person who suffers to be at large in any thoroughfare or public place, "any unmuzzled ferocious dog." Under the Dogs Act, 1871 (34 & 35 Vict. c. 56), provisions are made for dealing with "dangerous" dogs. By s. 2, on complaint that a dog is "dangerous," a court of summary jurisdiction may order it to be kept under proper control, or destroyed; and a penalty of 20*s.* per diem is incurred by disobedience of the order. By s. 3, where danger from mad dogs is apprehended, the local authority (i.e. county borough or district council) may make and enforce orders placing restrictions on all dogs not under proper control for such time as they may prescribe. The Board of Agriculture and Fisheries can, under the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22, as extended by s. 2 of the Dogs Act, 1906 (6 Edw. 7, c. 32), make orders (1) for prescribing and regulating the muzzling of dogs and keeping dogs under control; (2) for prescribing the seizure, detention, and disposal, including slaughter, of stray dogs, of dogs not muzzled, and of dogs not being kept under proper control, and for the recovery from the owners of the dogs of the expenses of their detention; (3) for prescribing and regulating the wearing by dogs, while on a highway or in a place of public resort, of a collar with the name and address of the owner inscribed on the collar or on a plate or badge attached thereto; (4) with a view to the prevention of the worrying of cattle, for preventing dogs from straying during all or any of the hours between sunset and

sunrise. Under s. 4, where a police officer has reason to believe that a dog found in a highway or place of public resort is a stray dog, he may seize it and detain it until the owner has claimed it and paid the expense of detention. If the owner of the dog is known, or the dog has a collar bearing the address of any person, notice is to be given intimating that the dog may be destroyed if not claimed within seven clear days of the service of the notice. Dogs not claimed may be destroyed or sold, but may not be sold or given away for purposes of vivisection. Registers of stray dogs are to be kept. No stray dog may be handed to a Dogs' Home unless a proper register is kept there. Persons who take possession of stray dogs are bound, under pain of fine, to give notice to the police (s. 4).

Provisions on the subject of ferocious dogs at large, and of protection against canine madness, will also be found in s. 72 of the Towns Improvement Clauses Act, 1854 (17 & 18 Vict. c. 103).

On account of the comparatively recent date of the statute of 1851, I do not think the maxim *contemporanea expositio est optima* prevents my departing from the interpretation hitherto, as I have mentioned, placed in this court on the sub-section in question. In the last (8th) edition of Broom's Legal Maxims (published in 1911) I find it stated, at page 532, that "In construing a modern statute *contemporanea expositio* is of no value, and the courts have refused to apply it to statutes framed within the last one hundred years," citing several cases.

For all these reasons I dismiss the present summons, and shall be very glad to state a case on the point involved.

BRADSHAW *v.* McMULLAN (1).

Appeal. 1915. April 28.

(1915. No. 3834.)

Practice—Originating Summons in Chancery Division to realize Mortgage—Jurisdiction to make Order for Personal Payment—Subsequent Action in King's Bench Division on Covenant for Payment—Staying Action—Order LV, Rules 7, 11.

Upon an originating summons issued by a mortgagee under Order LV, Rule 7, there is no jurisdiction to make a personal order for payment of the mortgage debt, and therefore if the mortgagee, pending such proceedings, brings an action in the King's Bench Division on the covenant for payment in the mortgage deed, such action will not be stayed.

Williams v. *Hunt*, [1905] 1 K. B. 512, distinguished.

(1) Before O'BRIEN L.C., PALLES C.B., and RONAN L.J.

Appeal. 1915. BRADSHAW *v.* MCMULLAN.

APPEAL by the defendant from an order of the King's Bench Division.

By an indenture dated the 17th December, 1913, the defendant covenanted with the plaintiff to pay to her the sum of £500, being the amount of certain arrears of rent due by the defendant to the plaintiff, together with interest thereon at the rate therein mentioned, and by the same indenture the defendant charged certain leasehold premises with the repayment of the said sum of £500 and interest.

On the 27th May, 1914, the plaintiff issued an originating summons, claiming (1) That it should be declared that the plaintiff was, by virtue of the indenture of the 17th December, 1913, entitled to a good charge in respect of the principal and interest thereby secured on the defendant's interest in the premises comprised in the indenture. (2) That an account should be taken of what was due for principal, interest, and costs, by virtue of the said indenture. (3) That the defendant might be ordered to pay to the plaintiff the amount so found to be due upon the taking of the said account within such time as the Court should direct. (4) A sale of the premises. (5) A receiver. (6) Costs. (7) Further and other relief.

The summons was heard before the Master of the Rolls on the 6th July, 1914, and an order was made declaring that the sum secured by the indenture of charge was well charged on the defendant's interest in the premises set forth in a schedule to the order. It was further ordered that an account should be taken at Chambers of what was due for principal and interest on foot of the indenture of charge, and in default of payment to the plaintiff of the sum certified to be due on the taking of the said account with further interest on the principal sum at the rate of £5 per cent. per annum until date of payment, and the costs thereinafter mentioned, within three months from the date of the Chief Clerk's certificate of the result of the account, the premises should be sold, and an account taken of debts and incumbrances and an enquiry made as to priorities. And the plaintiff was declared entitled to her costs when taxed in the same priority with her demand.

By the Chief Clerk's certificate, filed on the 12th March, 1915, it was found that there was due for principal and interest on foot of the indenture of charge the sum of £445 15*s.* 8*d.* for principal, with £42 7*s.* 10*d.* for interest, making together the sum of £448 3*s.* 6*d.*

The writ of summons in the present action was issued on the 31st March, 1915, claiming to recover the sum of £488 3*s.* 6*d.*, the amount of principal and interest due under the covenant in the indenture of charge.

The defendant applied to the King's Bench Division (Boyd and Molony JJ.) to stay the action, on the ground that the whole cause of action was the subject of an action pending in the Chancery Division, and that the bringing of the proceedings in the King's Bench Division was an abuse of the process of the Court, oppressive, and improper. The King's Bench Division refused the motion with costs.

Dickie K.C. and *James Henry*, for the appellant:—

It is well settled that if a mortgagee, who has brought an action in the Chancery Division to realize his security, afterwards brings an action in the King's Bench Division claiming a personal judgment for payment, the latter action will be stayed, inasmuch as a personal order for payment could have been obtained in the first action: *Williams* v. *Hunt* (1); *Poulett* v. *Hill* (2); *Burke* v. *Donaghue* (3). It may be contended that these cases are distinguishable on the ground that here the proceedings in the Chancery Division were by originating summons under O. LV, r. 7, and not by action, and that there was no jurisdiction on such originating summons to make a personal order for payment. We submit:—

First—Assuming that such personal order cannot be made on originating summons, yet if a mortgagee, who can by bringing an action in the Chancery Division obtain all the remedies to which he is entitled, deliberately elects to proceed by originating summons, he waives his right to bring a subsequent common-

(1) [1905] 1 K. B. 512.
(2) [1893] 1 Ch. 277.
(3) 20 L. R. Ir. 324.

Appeal. 1915. BRADSHAW v. MCMULLAN.

law action on the covenant for payment. "Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is a complete remedy in the Court in which the suit was first started": *Williams* v. *Hunt* (1), per Collins M.R., at p. 242. Here the plaintiff could have had a complete remedy in the Court in which the proceedings were started, by instituting an action. In *Williams* v. *Hunt* (1) an order for personal payment was not claimed in the action in the Chancery Division, yet it was held that the subsequent action in the King's Bench Division should be stayed.

Secondly, we submit that an order for personal payment can be made upon an originating summons issued by a mortgagee under O. LV, r. 7. Such an order is incidental to the relief mentioned in the rule. No doubt the rule does not expressly authorize the making of such an order, but neither does it expressly authorize the taking of an account of what is due on foot of the mortgage, yet it could not be suggested that there was no power to direct such an account. In *In re Hargreaves* (2) Lindley L.J., referring to O. LV, rr. 3 and 4 of the English rules, dealing with administration summonses, says that the effect is to enable persons who might obtain relief by bill, to get the same relief by summons. [Ronan L.J.: Does not the use of the word "bill" show that he was referring to the relief which could formerly have been obtained in the Court of Chancery?] The word "bill" is used in a general sense as equivalent to "action." "Action" is the word used both by Cotton L.J. and Lopes L.J. in the same case. In *In re Francke* (3) it was held that in an administration summons there was jurisdiction to appoint a receiver, although no power to do so was expressly given by the rules. In *In re Higgins and Percival* (4) it was held that on a summons under s. 9 of the Vendor and Purchaser Act, 1874, there was jurisdiction to order a return of the deposit, on the ground that, although such jurisdiction was not in terms given by the section, it was conferred by the words therein empowering the judge to "make such order on the application as to him shall appear just." There are similar

(1) [1905] 1 K. B. 512.
(2) 44 Ch. D. 236.
(3) 58 L. T. 305.
(4) 59 L. T. 213.

words in Rule 11 of Order LV, enabling the judge upon an originating summons "to pronounce such judgment as the nature of the case may require." The only authority cited for the suggestion in some text-books that an order for personal payment cannot be obtained on originating summons, is *Brooking* v. *Skewis* (1), but that case does not decide such point. [*Serrao* v. *Noel* (2); *Sinton* v. *Dooley* (3); *MacMahon* v. *MacMahon* (4); and *Bank of Ireland* v. *Slattery* (5) were also cited.]

S. L. Brown K.C., and *A. E. Wood*, for the respondent, were not called on.

O'BRIEN L. C.:—

I have come to the conclusion, and upon a very simple ground, that the judgment of the Court below was right, and will not have any of the ill effects suggested in the course of the argument.

In this case the King's Bench Division was asked to stay an action brought to recover a sum of £488 3*s*. 6*d*. due for principal and interest on foot of a covenant in an indenture of mortgage dated the 17th December, 1913, by which the defendant charged property of his with the repayment of a sum representing arrears of rent and some interest. It appears that before proceedings were taken in the King's Bench Division an originating summons was issued in the Chancery Division under the provisions of O. LV, r. 7, praying in the terms of the rule for a sale of the premises comprised in the mortgage, and for the ascertainment of the amount due; the sale to take place in the ordinary way if the amount was not paid.

I think that I represent accurately the view of the profession which has prevailed since this rule came into existence, namely, that it was generally regarded as a summary method of bringing about the realization of a security, as distinct from the enforcement of a merely personal remedy, the realization of which security might otherwise, having regard to s. 49 of the Landed Estates

(1) 58 L. T. 73.
(2) 15 Q. B. D. 549.
(3) [1910] 2 I. R. 162, 165.
(4) [1901] 1 I. R. 489.
(5) [1911] 1 I. R. 33.

Appeal. 1915. BRADSHAW v. MCMULLAN. O'Brien L.C.

Court Act (21 & 22 Vict. c. 72), have involved the expense of first bringing an action in the Chancery Division, and afterwards presenting a petition for sale to the Land Judge. The rule seems to be an extension to Ireland of a summary remedy which it was found desirable to give to incumbrancers in England, and which might for reasons peculiar to this country be even more beneficial here than in England, having regard to the many cases arising in this country where the property and amount secured are small. There was accordingly substituted for this expensive procedure a short and summary remedy by a proceeding before a judge in Chambers directed to the realization of the security, the sale of course, as was always done in small cases, being retained in the Court of the judge who made the order for sale.

I am convinced that this, and this only, was the object of O. LV, r. 7. It provides that "any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in the Chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say—Sale, delivery of possession by the mortgagor; redemption, reconveyance, delivery of possession by the mortgagee." It is impossible to suggest that that rule, taken *simpliciter*, refers to anything, so far as regards the remedies of a mortgagee, except to the realization of his security. There is an entire absence of anything which would suggest the incorporation into that originating summons of a personal claim for a judgment enforceable by execution against the property of the debtor, or, in cases within the Debtors Act, against his person. The more one considers the rule, the more clearly I think it appears that its sole object was what I have stated.

The proceeding by originating summons was applied, not to common-law proceedings, but to Chancery proceedings. It was open to the framers of the rules to give general jurisdiction or not to give it. If the rule does not give general jurisdiction, it is idle to suggest that a judge sitting at Chambers can exercise it,

since his whole power to depart from the normal procedure rests on Rule 7, and Rule 7 alone.

Reliance is placed on r. 11 of the same Order, which provides that "It shall be lawful for the Court or a judge upon such summons to pronounce such judgment as the nature of the case may require." It is contended that this rule enables the judge to convert a proceeding which for the reasons I have stated is restricted by the terms of Rule 7 to one matter only, the realization of the security, into a personal action, and enables the amount ascertained at Chambers to be due to be enforced by *fieri facias* or other process of execution. I read Rule 11 as merely giving power to pronounce such judgment as is consistent with the jurisdiction conferred by Rule 7.

If I am right in my interpretation of these rules, then the judgment of the Court below must be affirmed. The case of *Williams* v. *Hunt* (1) has no application. As the creditor could not in the proceedings by originating summons have obtained any relief except as against the property, he cannot by instituting such proceedings be deemed to have abandoned his other rights.

PALLES C.B. :—

I concur in the judgment of the Lord Chancellor. I think the case a very simple one.

It has always been the law that a mortgagee may pursue at the same time all his remedies. Thus before the Judicature Act he could bring an action on the covenant in a common-law Court, and also proceed in the Court of Chancery for the purpose of realizing his security. The Judicature Act merged all these courts into one, and I think that by such merger the rights of the mortgagee became qualified. I was party to several decisions in which it was held that if an action were brought in the Chancery Division for the purpose of realizing the security, an independent common-law action could not be brought in another Division. Our view was that the whole relief could be obtained in the Chancery Division. Therefore if this had been an ordinary action in the Chancery Division, an order should be made staying the action in the King's Bench Division. But the difficulty here is

(1) [1905] 1 K. B. 512.

Appeal. 1915.

BRADSHAW v. McMULLAN.

Palles C.B.

that the proceeding in the Chancery Division is not an action in the ordinary sense. It is a proceeding brought in Chambers under Order LV, Rule 7; and I agree with the Lord Chancellor that in a proceeding under that rule there cannot be a personal judgment for payment. I think that what is contemplated by the rule is the equitable relief that was granted before the Judicature Act. I am inclined to think that the English rule, which in accordance with our Judicature Act was adopted in this country with the one amendment of striking out 'foreclosure' as relief not usually applicable here, was drawn by an English equity draftsman, who had not before his eyes the common-law rights of a mortgagee.

Undoubtedly this procedure, not by writ but by originating summons, must be confined to the subject-matter of the rule which gives the jurisdiction, and which limits the relief to remedies of the nature specifically mentioned in Rule 7 of Order LV, and I think that Rule 11 of the Order must be taken as subject to the same limitation.

RONAN L.J.:—

For the reasons given by the other members of the Court I am of opinion that Order LV, Rule 7, does not authorize a personal judgment for payment of the mortgage money. Once we arrive at that conclusion, the rest seems to follow. A mortgagee may pursue all his remedies, and therefore may take his remedy under Order LV, Rule 7. In this case the mortgagee has taken all the remedies he can get under this Rule. He is entitled to take all his other remedies, and his only means of getting the remedy of a personal judgment is by an action. If we were to decide that he should not be allowed to bring such action, the result would be that no one could proceed by originating summons for the realization of his security without thereby giving up his right to a personal judgment.

Solicitor for the appellant: *James Dickie.*
Solicitor for the respondent: *H. F. Chidley.*

J. G. T.

MARY ANNE HEALY AND ANOTHER *v.* MAURICE SPILLANE AND ANOTHER (1).

K. B. Div. 1914. Nov. 12, 17, 18. *Appeal.* 1915. Jan. 19, 20.

Landlord and Tenant—Action for rent by Head Landlord against a Sub-tenant of Middleman under s. 12, sub-s. 2, of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47)—Defendant named in and served with Ejectment Proceedings under s. 12, sub-s. 1, of the Act, and not appearing on hearing of Ejectment—Defence to Action for Rent that Defendant was not Sub-tenant to Middleman — Estoppel—Case Stated—Validity of Ejectment Decree questioned—Question of Validity of Decree not raised by the Case as stated.

Where a defendant, named in and served with ejectment proceedings under sect. 12, sub-s. 1, of the Land Law (Ireland) Act, 1896, as a sub-tenant of the middleman, does not appear on the hearing, and a decree in ejectment is granted, such defendant is estopped, in a subsequent action for rent taken against him by the head landlord under sub-s. 2 of the above section, from denying that his possession of the lands was as sub-tenant to the middleman.

So *held* by the Court of Appeal, affirming the decision of the King's Bench Division.

Held, by Palles C.B. (Madden and Boyd JJ. dissenting), that as in the ejectment decree under sect. 12, sub-s. 1, of the above Act, the middleman was described as holding under a "lease for ever" of the year 1784, it was to be presumed on the authority of *Chute* v. *Busteed* (16 I. C. L. R. 222), that at the date of the ejectment the relation of landlord and tenant did not subsist as between the head landlord and the middleman, and that consequently the ejectment decree was invalid and could effect no estoppel; and that the question for the Court being whether the defendant in the case was estopped by the decree, the Court could consider whether the decree was valid or not, even though no point or suggestion as to the invalidity of the decree appeared in the case as stated, since on a question of estoppel by judgment it is a condition precedent to the judgment operating as an estoppel that it should be valid and regular.

Held, by Madden and Boyd JJ.—(1) That the statement in the decree that the middleman held under a lease for ever did not necessarily raise a presumption that the interest of the middleman was that of a fee-farm grantee, and (2) whether the decree was invalid or not, the case as stated must be considered by the Court as stated only on the question of estoppel arising if the decree

(1) In the King's Bench Division, before PALLES C.B. and MADDEN and BOYD JJ.

K. B. Div. 1914.

HEALY v. SPILLANE.

was valid, and the case as stated must be taken to have been submitted on the agreement by both parties that the decree should be treated as a valid and regular decree.

Held, by the Court of Appeal, that the point as to the invalidity of the decree was not open on the case as stated.

CASE STATED, at the request of the defendants, by Kenny J., at the Summer Assizes, 1914, for the county of Cork. The case set out as follows:—

(1) This case came before me at the Summer Assizes for the county of Cork, on an appeal from a decree of the Recorder of Cork, dated the 15th June, 1914, for the sum of £27 10*s.* with £2 7*s.* costs and witnesses' expenses.

(2) The civil bill was brought for the recovery of £61 5*s.*, being two and a-half years' rent alleged to be due by the defendants to the plaintiffs, up to and ending the 25th March, 1914.

(3) The facts were these. The plaintiffs, on the 5th June, 1913, obtained a decree of the county court for recovery of the possession of the lands in respect of which the rent sued for in this action was due. The action of ejectment was one grounded on non-payment of one and a-half year's rent, due up to the 25th March, 1913, under a lease dated 27th March, 1784, under which the lands were held at a rent of £40 Irish currency, i.e. £36 18*s.* 5*d.* present currency, the grantee's interest in which was alleged to be vested in the Rev. James Stephenson, who is not a party to the suit, and whose address is unknown.

(4) The ejectment was brought under the provisions of section 12 of the Land Law (Ireland) Act, 1896, the entire of the premises being alleged to be in the occupation of sub-tenants.

(5) The civil bill in the said ejectment suit was in the form provided by the rules under the said Act, and was served upon the defendants, but they did not appear at the hearing thereof.

(6) The said civil-bill ejectment alleged that the defendants in the present civil bill were in occupation of portion of the said lands as sub-tenants thereof, and that the plaintiffs admitted the rights of the defendants, under the said section 12 of the Act of 1896, to retain possession as immediate tenants of the plaintiffs and not to have the decree in the said ejectment suit executed against them.

(7) The said decree of the 5th June, 1913, was also in the form given by the said rules, and contained the following paragraph: "And the Court having determined that the said premises consist entirely of holdings which are in occupation of the other defendants as tenants within the 12th section of the Land Law (Ireland) Act, 1896, and that the said James Stephenson, whose address is unknown, is immediate landlord of the said premises within the same section."

(8) In the course of the hearing of the said appeal before me, counsel for the plaintiffs relied upon the findings in the said ejectment decree as an estoppel against the defendants, and contended that they must be deemed to be under-tenants in actual occupation of their holdings, and liable for the respective rents payable thereout by them as such under-tenants.

(9) For the defendants it was contended that the said ejectment decree was not an estoppel, and that it lay upon the plaintiffs to satisfy the Court that, notwithstanding the said decree, they were such under-tenants as aforesaid, and that they were entitled to go into a case in order to establish that they were not such under-tenants, but had actually acquired, at the date of the said ejectment decree, the estate of the said James Stephenson by virtue of the Statute of Limitations.

(10) I was inclined to hold that there was an estoppel. This particular civil bill was only one of several, and counsel for the two defendants in this case asked me to state a case for the King's Bench Division on the question of estoppel, which I consented to do.

(11) The question for the Court is whether the decree in ejectment operates as an estoppel so as to prevent the defendants alleging that they are not under-tenants.

(12) If the question be answered in the affirmative, there is to be a decree in this case for £61 5*s*., with costs and expenses below, and costs of appeal.

(13) If the question be answered in the negative, the civil bill is to be dismissed on the merits, with costs in the civil bill Court and costs of appeal.

(14) The civil-bill ejectment, dated the 15th May, 1913, the civil-bill decree, dated 5th June, 1913, and the civil bill

K. B. Div. 1914.

HEALY v. SPILLANE.

herein, dated the 19th May, 1914, are annexed to this case and are to be deemed incorporated herewith.

The civil bill in ejectment was as follows :—

LAND LAW ACTS.

Civil-bill ejectment for non-payment of rent where one year's rent is due, and where the entire of the premises is in the occupation of sub-tenants.

Cork County, East Riding, Division of Midleton.

Mary Anne Healy of 56 Palmerston Road, in the city of Dublin, widow, Charlotte Healy, of Kill, Tullow, in the county of Carlow, widow, and Kathleen Kennedy, wife of George Kennedy, of Ballinamultina, Clashmore, in the county of Waterford, Esquire,

Plaintiffs.

Thomas Kelleher, Maurice Spillane, John Cotter, Mary Frances Cotter, his wife, Edmond Downing, James Downing, John Reany, John Twohig, John Carroll, Mary Brennan, widow, John Cullinane, all of Scariff, in the said county, riding, and division, farmers,

Defendants.

BY THE RECORDER OF CORK.

Whereas the Reverend James Stephenson, whose present address is unknown, holds part of the lands of Scariff, formerly in the possession of John Lawless, bounded [the boundaries and acreage were set out], situate at Scariff in the parish of Midleton and Cloyne and barony of Imokilly and in the division of Midleton and county of Cork aforesaid, as tenant to the plaintiffs under a lease for ever, dated the 27th day of March, 1784, made by John Hanning to the Reverend John Lawless, at the yearly rent of £40, late Irish currency, equivalent to £36 18*s.* 5½*d.* present currency ; and whereas the sum of £55 7*s.* 6*d.* of the said rent, being one full year's rent and upwards due and ending on the 25th day of March last, being the gale day next before the date of this ejectment, became, and still is due to the plaintiffs in

respect of the said premises; and whereas the defendant Thomas Kelleher is in occupation of 70 acres thereof as sub-tenant thereof, and the defendants Edmond Downing, James Downing, John Reany, John Twohig, are in the occupation of 32 acres, as sub-tenants thereof; and the defendants Maurice Spillane, John Cotter, and Mary Frances Cotter, are in the occupation of 60 acres as sub-tenants thereof, and the defendants John Carroll and Mary Brennan are in the occupation of 4 acres as sub-tenants thereof, and the defendant John Cullinane is in the occupation of 22 acres as sub-tenant thereof, and whereas no other person is in the occupation of any other part of the said premises, and whereas the plaintiffs admit the right of the defendants Thomas Kelleher, Maurice Spillane, Edmond Downing, John Carroll, and John Cullinane, under sect. 12 of the Land Law (Ireland) Act, 1896, notwithstanding a decree for possession for the plaintiffs, to retain possession as immediate tenants to the plaintiffs of the said parts of said premises so as aforesaid in their occupation, and not to have such decree executed as against the said Thomas Kelleher, Maurice Spillane, Edmond Downing, John Carroll, and John Cullinane; and whereas the plaintiffs are ignorant as to such right of the said John Cotter, Mary Frances Cotter, James Downing, John Reany, John Twohig, and Mary Brennan under the said 12th section, the defendants, therefore, and all persons having or claiming any interest in the premises, are hereby required personally to appear at the county court to be held at Fermoy, in the division and county aforesaid, on the 5th day of July next, to answer the plaintiffs' bill to recover possession of all the said premises as against the said Reverend James Stephenson, and to recover clear possession from the said John Cotter, Mary Frances Cotter, James Downing, John Reany, John Twohig, and Mary Brennan, save so far as the said John Cotter, Mary Frances Cotter, James Downing, John Reany, John Twohig, and Mary Brennan established such right as aforesaid in respect of the premises in their occupation as above mentioned, and to have execution for the same.

Dated this 15th day of May, in the year 1913.

K. B. Div. 1914.

HEALY v. SPILLANE.

The civil bill for rent upon which the appeal was brought was as follows :—

County of Cork, East Riding, Division of Midleton.

Mary Anne Healy, of 56 Palmerston Road, in the city of Dublin, widow, Charlotte Healy, of Kill, Tullow, in the county of Carlow, widow, and Kathleen Kennedy, wife of George Kennedy of Ballinamultina, Clasmore, in the county of Waterford, Esq., *Plaintiffs.*

Maurice Spillane, and John Cotter, both of Scariff, near Midleton, in the said county, east riding, and division, farmers,

Defendants.

BY THE RECORDER OF CORK.

The defendants are hereby required to appear personally at the county court to be held at Youghal, in the said county, on the 15th day of June, 1914, to answer the plaintiffs' bill for £61 5*s.*, being for two and a-half years' rent of part of the lands of Scariff aforesaid up to the 25th day of March, 1914, which lands were held by the defendants under the Reverend James Stephenson, as yearly tenants at the yearly rent of £24 10*s*, payable half-yearly, and which rent is due and owing to the said Reverend James Stephenson, and the right to recover same is vested in said plaintiffs by force of the statute 59 & 60 Vict. c. 47, s. 12, and the decree in ejectment made by His Honour the Recorder of Cork, at Fermoy, on the 5th day of June, 1913.

Dated this 19th day of May, 1914.

H. J. Moloney for the defendants :—

The question before the Court is whether the decree in ejectment operates as an estoppel preventing the defendants from denying that they were sub-tenants to Stephenson.

An estoppel, of whatever kind, must be clear in intention ; and where a record is set up as an estoppel, it is essential that it should be a valid record clearly dealing with the fact which is to be presumed by estoppel. A judgment or decree cannot operate as an estoppel against the parties to the suit or their privies,

unless it be a valid judgment or decree, and the matter to be established by the estoppel was clearly in issue in the suit, and clearly determined by the judgment or decree. The present decree cannot operate as an estoppel, since the fact which it sought to establish by the decree was not an essential part of the determination of the Court on the ejectment. The defendants were prepared to establish by evidence that they had acquired the interest of Stephenson by force of the Statute of Limitations; the decree in ejectment was a decree for the possession of Stephenson's interest, and although the decree recites that the defendants were tenants, and the civil bill recites that they were undertenants, the essential fact to be determined by the Court on the ejectment was not the fact of the sub-tenancies, but the fulfilment of the conditions precedent to enable possession to be obtained against Stephenson. If it were otherwise, then the curious anomaly would result that a head landlord by reciting in his civil bill that John Roe, who has no interest at all in the premises, is a sub-tenant thereon, and, by serving John Roe with the civil bill, could, in default of Roe's appearance at the hearing, establish by estoppel a statutory tenancy under the 12th section as against Roe, though in fact he had no interest at all. Either the plaintiff in a civil-bill ejectment under this section must prove in detail and particular every sub-tenancy alleged, or else the mere recital of sub-tenancies operates no further than to preserve the rights of those sub-tenancies if they exist, their existence or extent not being in issue in the ejectment.

Here the civil bill does not admit the right of John Cotter, and it is for the recovery of clear possession from him unless he established a right under the section. The decree recites service but there is no evidence to show that the right of John Cotter was in issue, or any evidence given of his interest. The case states that the defendants did not appear on the ejectment, and the mere recital in the decree of their being in possession as undertenants, coupled with the doubtful statement as to John Cotter, cannot be read as a determination upon a point essential for the Court to determine. All that the Court had to do in relation to any sub-tenants who did exist was to preserve their rights, and the record of the decree is an estoppel, if at all,

K. B. Div. 1914.

HEALY v. SPILLANE.

only in protection of the right of any person who proved that his interest was a sub-tenancy.

But this decree cannot in any case operate by estoppel, since, on its face, it is without jurisdiction. James Stephenson is described as being the immediate landlord under a "lease for ever" of 1784. That must have been a fee-farm grant, and as the relation of landlord and tenant did not subsist between the plaintiffs and Stephenson, they could not bring an ejectment against him: *Black* v. *Davis* (1); *Bond* v. *Trustees of Sterne* (2). The 14 & 15 Vict. c. 20, s. 1, does not assist, as that statute expressly excepts from the remedy by ejectment any fee-farm grants not made under the 12 & 13 Vict. c. 105. In *Chute* v. *Busteed* (3), decided upon the 3rd and 12th sections of the Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), it was held that the relation of landlord and tenant was not created by a fee-farm grant made before the passing of that statute; and Bewley J. in *Kelly* v. *Rattey*, reported in note to *Hamilton* v. *Casey* (4), held the same with reference to the rights of a fee-farm grantee under the Redemption of Rent (Ireland) Act, 1891 (54 & 55 Vict. c. 17). That relation is necessary to support an ejectment under sect. 52 of 23 & 24 Vict. c. 154, and it is also necessary to support an ejectment under the 12th section of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47). Here the decree upon its face shows that that essential relationship did not exist, the interest of the plaintiffs being only that of rentchargers, outside the 14 & 15 Vict. c. 20, s. 1, and consequently the decree by which it is sought to estop the defendants is invalid, and so much waste paper; it affects neither the interest of Stephenson nor the interests of any of the defendants. It makes no matter that the case stated is silent as to this point, since the case expressly incorporates the decree, and the decree being bad on its face affords an answer to the estoppel suggested. Whether this point be stated in the case or not, where this Court has to consider the question of estoppel or no estoppel, it cannot fail to consider the

(1) Batty, 80.
(2) *Ibid.* 87.
(3) 16 I. C. L. R. 222.
(4) [1894] 2 I. R. 224, at p. 226.

question whether there was jurisdiction to make the decree which is tendered as an estoppel. Not only is the question open to the defendants, but, unless the defendants consented to waive it, it is a matter which the Court would be bound to consider in law on the very question submitted.

G. J. Daly and *H. D. Conner K.C.* for the plaintiffs:—

Chute v. *Busteed* (1) was not decided upon sect. 52 of 23 & 24 Vict. c. 154, and Dowse B. in *Mennons* v. *Burke* (2) suggested that sect. 52 is not governed by *Chute* v. *Busteed* (1).

The only question before the Court on the case stated is the operation of the ejectment under sect. 12 of 59 & 60 Vict. c. 47. It cannot be suggested that the form of decree prescribed by the rules, which was followed here, operates no further than as a mere declaration of the provisions of the section. Here, in fact, the decree states that the Court decided that the premises were held by the defendants, other than Stephenson, as sub-tenants. The very object of the section was to establish a new relationship between the head landlord and the sub-tenants, and the decree in an ejectment under that section must of necessity determine who are the parties whose relationship is thus affected. The admission of sub-tenancies by the plaintiffs was an admission which the defendants, served with the proceedings and required to appear, were bound to challenge if it was not true; and where the very foundation of the jurisdiction to give the particular decree provided by the section rests upon the existence of sub-tenancies, it becomes essential for the Court to determine the character of the possession of all parties stated to be, or in fact being, in possession. This essential fact is established in this decree by a clear finding, and on familiar principles it operates as an estoppel by record.

[They cited Lord Halsbury, Laws of England, vol. xiii, p. 233, par. 450; *Congested Districts Board* v. *Curry* (3); *French* v. *Mitchell* (4); and *Irish Land Commission* v. *Ryan* (5).

Moloney, in reply.

(1) 16 I. C. L. R. 222.
(2) 26 L. R. Ir., at p. 197.
(3) [1909] 2 I. R., at p. 508.
(4) [1904] 2 I. R. 182.
(5) [1900] 2 I. R. 565.

K. B. Div. 1914.

HEALY v. SPILLANE.

PALLES L.C.B.:—

This case has been very fully and ably argued. It involves an important question under the twelfth section of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47). It is embarrassed by a point raised by Mr. Moloney in argument, viz., that the ejectment proceedings, by which it is sought to estop the defendants, were not valid, because, at the time when they were brought, the relation of landlord and tenant did not exist between the parties. It appeared upon the face of the ejectment that the lands were held under what was called "a lease for ever," of the year 1784. Upon such a lease there can be no reversion, and, in my opinion, the law as laid down in *Chute* v. *Busteed* (1) applies to proceedings under the 52nd section of the Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), and consequently as the relation of landlord and tenant, which enables ejectment to be brought, did not exist, the proceedings in that action were void, and did not evict the lease.

The question was raised as to whether this point was open to Mr. Moloney upon the case reserved for our decision, and, upon this point, I unfortunately differ from my brothers. I consider that it is open. The question reserved is one of estoppel, and it was held in *M'Sheffry* v. *Doherty* (2) that there cannot be such an estoppel by proceedings in ejectment brought under an instrument under which ejectment will not lie. In such a case the judgment is one which is without jurisdiction, and consequently void, and there cannot be an estoppel by reason of a void judgment. I shall say no more on this branch of the case than that, in my opinion, by reason of the relation of landlord and tenant not having existed between the parties to the instrument of 1784, there is no estoppel.

I pass now to the consideration of the real question in the case, and on that I entertain a strong opinion. Assuming that the ejectment was valid, does it amount to the estoppel contended for, that is, an estoppel against the defendants that they were, as alleged in the ejectment, sub-tenants at the time the civil-bill ejectment was brought? Now, I am of opinion that there was

(1) 16 I. C. L. R. 222. (2) [1897] 2 I. R. 191, 210.

such an estoppel. No doubt, at common law, an ejectment for non-payment of rent did work an estoppel with respect to certain matters relating to the rights of the parties. It is quite settled that a judgment in ejectment for non-payment of rent works an estoppel against all parties as to the amount of rent due. I think the same principle applies to ejectments brought under the 12th section of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), and prevents a person served with ejectment proceedings, and described therein as holding part of the lands as a sub-tenant, from alleging, after judgment has been obtained in that ejectment, that he was not such sub-tenant.

The operation of an ejectment under sect. 12 of the Land Law (Ireland), Act, 1896 (59 & 60 Vict. c. 47), is very different, as regards a sub-tenant, from the common-law operation of ejectment for non-payment of rent. Under ordinary circumstances, where a tenant creates sub-tenancies and is evicted, the sub-tenancies are determined by the execution of the *habere*, and the landlord recovers possession against the sub-tenants, as well as against the mesne tenant, and unless there is a redemption the sub-tenancies are determined. The 12th section provides that this shall no longer be the effect of the judgment in cases within that section. Consequently it became essential, after the passing of the Act, that the Court, before judgment in an ejectment for non-payment of rent, should determine whether there were existing sub-tenants on any part of the lands in question, whose rights were to be guarded by the 12th section. That was essential to formulate correctly the judgment and the execution which should issue. If there were no sub-tenancies within the 12th section, the judgment and the writ of *habere facias possessionem* thereunder would be for all the lands; on the other hand, if the 12th section applied, and there was a sub-tenant in possession of part of the premises, the judgment for possession and the writ should necessarily be confined to the residue of the lands only, and, in a case like the present case, where all the lands were in the possession of sub-tenants, the writ of *habere facias possessionem* could not issue at all. The Legislature, however, whilst it deprived the landlord of the right to possession, which he previously had where the land was in the possession of sub-tenants, conferred

K. B. Div. 1914.

HEALY v. SPILLANE.

Palles C.B.

upon him certain substituted rights. It placed him in the position of the immediate landlord to the sub-tenants, and enabled him to sue them for rent accordingly. That is the right given by the Act, and to give effect to it it is essential in such cases for the Court, in an ejectment for non-payment of rent, to determine by its judgment whether or not the person in possession was in possession as sub-tenant.

I am of opinion that, in circumstances like these, there is an estoppel between the parties as to this matter which is one of the essential matters to be determined. Therefore, if the point that there is here no estoppel, because the ejectment was invalid, is not open, as my colleagues think it is not, I am of opinion that there is an estoppel under this ejectment.

MADDEN J.:—

The first question in this case is one of general interest; it is whether, assuming that the decree in ejectment was a legal ejectment, it operates as an estoppel by which the defendants are prevented from denying that they were in possession as under-tenants. On this question the members of the Court are of the same opinion.

Another question, which is one of much less importance, arises upon the construction of the present case. That question is whether it is open to us to consider the particular ground upon which it is contended that there is no estoppel, that is to say, the invalidity of the decree in ejectment. It would have been open to the parties to have agreed that the case should be stated on the assumption that the decree in ejectment was regularly and legally had, and, in my opinion, the case as to estoppel was in effect so submitted. Mr. Moloney argues that the decree is bad on the face of it. It is not necessary for us to consider what would be the effect on the case before us if that were so, because I am satisfied that the decree is not bad on the face of it. The decree states that the immediate landlord was tenant to the plaintiffs under a "lease for ever," dated the 27th March, 1784. Mr. Moloney asks us to read this as a statement that it was fee-farm grant. I do not think we are bound so to read it. The lease might as

reasonably be either of two classes of lease which are sometimes so described, neither of which is a fee-farm grant. A lease for lives with a covenant for perpetual renewal is often described, and rightly described, as a lease for ever, so is a lease for a term of years with a covenant for perpetual renewal. Neither of these leases is a fee-farm grant.

Passing from that consideration I apply myself to the language in which this case is stated—"In the course of the hearing of the said appeal before me, counsel for the plaintiffs relied upon the findings in the said ejectment decree as an estoppel against the defendants, and contended that they must be deemed to be under-tenants in actual occupation of their holdings, and liable for the respective rents payable thereout by them as such sub-tenants." We are all of opinion that, if the ejectment was valid, that was its effect—"For the defendants it was contended that the said ejectment decree was not an estoppel,"—there is not a suggestion of any question as to its validity,—"and that it lay upon the plaintiffs to satisfy the Court that, notwithstanding the said decree, they were such under-tenants as aforesaid, and that they were entitled, if necessary, to go into a case." As to what? Not as to the validity of the decree, but "in order to establish that they were not such under-tenants, but had actually acquired, at the date of the said ejectment decree, the estate of the said James Stephenson by virtue of the Statute of Limitations."

To put it shortly, I regard the present case as one submitted to us on a question of estoppel. I said on the assumption by both parties that this decree, as to the validity of which there is not a word in the case stated, is to be treated as valid; and on that part of the case I am unable to agree with my Lord Chief Baron.

BOYD J.:—

I concur with my brother Madden, in his entire judgment, and with my Lord Chief Baron as to the effect of the decree in this case, assuming it to have been a valid decree. I adopt the reasoning and the view of my brother Madden as to the point raised by Mr. Moloney with regard to the suggested invalidity of the decree.

C. N. K.

Appeal.
1915.

HEALY
v.
SPILLANE.

Jan. 19, 20.

The defendants appealed to the Court of Appeal. (1)

Moloney for the appellants.

Serjeant Sullivan K.C., *H. D. Conner K.C.*, and *G. J. Daly* for the respondents.

The arguments were the same as in the Court below.

O'BRIEN L.C.:—

In this case an important question has arisen for determination; but once the position of affairs is accurately appreciated, I see no real difficulty in solving it. The proceedings here were based on the ejectment code existing prior to the Land Law (Ireland) Act, 1896, as controlled and affected by section 12 of that statute. Section 12 introduced an important modification into the then existing law relating to decrees in ejectment and their effect; the object of the section being to afford protection to tenants in possession of holdings from ejectment brought about by the non-payment of rent by the immediate to the superior landlord, the default being not that of the tenant but of the middleman. For the purpose of making section 12 operative and effective, it became necessary to enact certain rules applicable in the superior courts and the county courts respectively. These rules require certain averments to be made and proved by the plaintiff, and when that is done the section enables a decree to be made which in terms appears to destroy the interest of the immediate landlord, subject to his existing right to redeem his interest, but instead of the tenants who are in possession being dispossessed of their holdings, the decree finds upon its face that such tenants are in occupation as under-tenants at that date, and accordingly, unless the non-payment of rent was owing to the default of such under-tenants, the decree is not executed against them, but the important result follows that the superior landlord thenceforth stands in the relation of immediate landlord to such tenants. The latter on the one hand escape the harshness of the law which

(1) In the Court of Appeal, before O'BRIEN L.C., CHERRY L.C.J., and MORIARTY L.J.

might, but for the operation of sect. 12, have resulted in their being dispossessed of their holdings, while, on the other hand, they became liable to certain obligations to the superior landlord which did not previously exist. It appears to me, accordingly, to be an elementary proposition, that if the County Court is to make a valid decree in ejectment with a view to giving effect to sect. 12 of the Land Act of 1896, it must first find the facts which are essential to the validity of such a decree under the section and the rules made in pursuance of it, one of those facts being the existence of certain persons holding as under-tenants to a middleman. That being an essential matter to be averred and established by the plaintiff, and one which must, under the rules, appear on the face of the decree, it is, in my judgment, clear that such a decree operates by way of estoppel between the under-tenants or those found to be such, and the superior landlord, so far as the existence of such sub-tenants is concerned. The judgment of the Lord Chief Baron, which is most concise and careful, entirely satisfies my mind as to this, and I would have added nothing thereto, but for the strenuous way in which the defendants' argument was pressed upon this Court. I desire, however, to confine my judgment to this one question, and I express no opinion upon the further question argued before us, namely, as to the validity of the decree. I am satisfied that the learned judge intended to leave one question, and one only, for the determination of this Court, namely, whether the defendants are estopped by the decree from denying that they were under-tenants. The further question is not open, and I express no opinion upon it. The appeal must be dismissed.

CHERRY L.C.J. and MORIARTY L.J. concurred.

Solicitors for the plaintiffs: *A. H. Allen & Son.*
Solicitors for the defendants: *J. Moloney & Son.*

R. ST. J. C.

K. B. Div. 1915.

May 4.

CLEARY AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY (1).

Practice—Damages—Fatal Accidents Act, 1846—*Apportionment—Payment into Court—Minor.*

Where money is paid into Court under the Fatal Accidents Act, 1846, and accepted in full satisfaction by the plaintiffs, one of whom is a minor, the Court has jurisdiction to apportion the money between the adult and the minor plaintiff.

Davy v. *Gray*, 48 I. L. T. R. 32, followed.

MOTION to apportion money paid into Court under the Fatal Accidents Act, 1846.

This was an action brought by Patrick F. Cleary and Joseph Patrick Cleary, an infant, by the said Patrick F. Cleary, who was his father, as next friend, against the London and North Western Railway Company, to recover damages under the Fatal Accidents Act, 1846, for the death of Maryanne Cleary, the wife of the plaintiff Patrick F. Cleary and mother of the minor plaintiff.

The material parts of the statement of claim were as follows:—

"1. The plaintiffs, who are the husband and only child of Maryanne Cleary, late of Butte City, Montana, in the United States of America, have suffered damage from the defendants' negligence in carrying the said Maryanne Cleary as a passenger by the defendants' steamer, whereby the said Maryanne Cleary was fatally injured on the 23rd day of October, 1914.

"2. No representation has been taken out to the said Maryanne Cleary.

"3. Particulars pursuant to the statute are as follows:—Names of the persons on whose behalf the action is brought: the plaintiff Patrick F. Cleary, husband of the deceased; the plaintiff Joseph Patrick Cleary, aged four years, the only child of the deceased.

(1) Before MOLONY J.

"The nature of the claim in respect of which damages are sought is as follows:—The deceased, Maryanne Cleary, who was fatally injured by the negligence of the defendants, was about to act as manageress and otherwise aid the plaintiff Patrick F. Cleary in his business of a hotel-keeper at Dingle, Co. Kerry, and also to keep house for the plaintiff Patrick F. Cleary.

"The deceased, Maryanne Cleary, contributed, and would have further contributed, to the support of the minor plaintiff Joseph Patrick Cleary, and would have aided and superintended the upbringing and education of the said minor plaintiff."

The defendants, in addition to traverses, brought into Court £150, and pleaded that that sum was enough to satisfy the whole claims of the plaintiffs in the action, and of all persons entitled under the Fatal Accidents Act.

The plaintiffs served notice accepting this sum in satisfaction of their claim.

The present application was brought by Augustine Stack, acting as attorney for the plaintiff Patrick F. Cleary, under a power of attorney, for an order apportioning the damages in the action between the plaintiff Patrick F. Cleary and the minor plaintiff Joseph Patrick Cleary, in such proportions as to the Court should seem just, and for payment out to Augustine Stack, as attorney for the said plaintiff Patrick F. Cleary, of such portion of the said damages as should be apportioned as the share of the said Patrick F. Cleary.

The notice of motion was served on Sir Augustine Baker, General Solicitor for Minors and Lunatics.

The application was grounded on an affidavit of the applicant, which, having referred to the pleadings and the matters set out in them, and the notice accepting the money paid into Court in full satisfaction, went on to say:—

"The plaintiff Patrick F. Cleary was an assistant chief of fire brigade in the city of Butte, Montana, United States of America, and he returned to Ireland in the month of October last, with his wife, the said Maryanne Cleary, deceased, and their only child, the plaintiff Joseph Patrick Cleary. The said Maryanne Cleary met with an accident on board a steamship belonging to the defendant company, and died in Dublin, on the

K. B. Div. 1915.

CLEARY v. LONDON AND NORTH WESTERN RAILWAY COMPANY.

morning of the 31st October, as a result of the accident. The plaintiff Patrick F. Cleary and his wife had intended to start in business as hotel-keepers in the town of Dingle. The said Patrick F. Cleary changed his mind as to settling down in Dingle after his wife's death, and returned to the United States of America, to wind up some business of his there, before deciding as to his future career. He took the minor plaintiff, who is only about four years of age, along with him, with the intention of providing for the maintenance and education of the said child.

"The said Maryanne Cleary was entitled to certain property, which she received from her father, Maurice P. O'Donnell, of Dingle, who died at Dingle, aforesaid, on the 2nd day of February, 1905, . . . the said property at the time of the death of the said Maryanne Cleary was, to the best of my knowledge, of the value of £800."

He further referred to the will of Maryanne Cleary, deceased, dated the 5th day of October, 1914, whereby it appeared that the said Maryanne Cleary, deceased, left all her property in trust for the minor plaintiff Joseph Patrick Cleary, who would, therefore, benefit to that extent by her death.

Arthur Clery, for the applicant:—

We ask for an order apportioning the damages between the plaintiffs.

[MOLONY J.: You must show that there is jurisdiction to make the order.]

There is jurisdiction to make the apportionment without going to a trial: *Davy* v. *Gray* (1). We have followed the procedure laid down in that case by serving the General Solicitor for Minors and Lunatics. We make no suggestion as to the amounts to be apportioned respectively between the parties.

The Court made the following order:—

"It appearing to the Court that the apportionment of the sum of £150 lodged in Court as hereinafter mentioned is for the benefit of Joseph Patrick Cleary, the minor plaintiff, it is ordered that

(1) 48 I. L. T. R. 32.

the Accountant-General do, out of the said sum lodged in Court, pay to the said Augustine Stack the sum of £4 4s. for the costs of this motion, and also to the said Augustine Stack, as such attorney for the said plaintiff, Patrick F. Cleary, the sum of £65 16s. for the benefit of the said Patrick F. Cleary. And it is further ordered that the Accountant-General do place the sum of £80, hereby apportioned as the amount proper to be allocated for the said Joseph Patrick Cleary, to the separate credit of the said minor, and do invest the same in War Loan Stock 1925–1928; and that the dividends which may become due upon the investment of the said £80 from time to time be allowed to accumulate and be reinvested in the said security in such sums as the Accountant-General shall think fit."

Solicitor for the applicant: *John O'Connell.*

A. E. C.

DAVID ALLEN & SONS, BILLPOSTING, LIMITED *v.* KING (1).

(1914. No. 10,617.)

Licence—Right to revoke—Assignment of Subject-matter to which attached—Refusal by Assignee to continue Licence—Breach of Contract by Licensor—Licensees' Right of Action against Licensor.

By a contract contained in an agreement, not under seal, entered into on the 1st July, 1913, between the defendant, described therein as "the licensor," and the plaintiffs, described as "the licensees," the defendant granted to the plaintiffs exclusive permission to affix posters and advertisements to one of the walls of a picture house proposed to be erected on his property by a company about to be formed, for a term of four years, from the 1st November, 1913, or the first day the picture house should be opened for business, at a rent of £12 per annum.

An agreement for a lease of the site, dated the 29th August, 1913, and made between the defendant and a trustee for the Picture House Company, provided that the defendant should assign to the trustee for the company his interest under the agreement of the 1st July, and that the trustee should, as soon as the company should be registered, obtain the ratification by the company of the said agreement.

(1) Before MADDEN, KENNY, and DODD JJ.

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

On the 2nd September, 1913, the Picture House Company was registered, with articles of association containing a provision for carrying the agreement of the 29th August into effect. The lease to the company was executed on the 13th September, 1913, and at a meeting of the directors on the same day the agreement of the 29th August was ratified and adopted. Neither the articles of association nor the lease contained any reference to the agreement of the 1st July. The Picture House Company, having refused the permission granted by the licence, the licensees brought an action for damages for breach of contract against the licensor.

Held, by Madden and Dodd JJ., Kenny J. dissenting, that the licensor was answerable in damages for breach of the contract embodied in the agreement of the 1st July.

Hurst v. *Picture Theatres, Limited*, [1915] 1 K. B. 1, applied and followed.

MOTION to set aside verdict for plaintiffs, and enter verdict and judgment for defendant.

The action, which was one for breach of contract, was tried before Gibson J., without a jury, on the 16th and 17th February, 1915. The plaintiffs' claim was for damages for breach of a contract contained in a memorandum of agreement dated 1st July, 1913, whereby the defendant agreed to let to the plaintiffs the flank wall of the picture house to be erected at the Royal Canal bank, Phibsboro', Dublin, for the purpose of posting advertisements thereon. In the agreement the defendant was described as the "licensor," and the plaintiffs were called "the licensees." The material clause was in the following terms:—"The licensor gives the licensees permission to affix bills, posters, and advertisements to the flank wall at side of picture house proposed to be erected at Royal Canal bank, and Madras Place, Dublin, for a term of four years, from the 1st day of November, 1913, or the first day the said picture house shall be opened for business, whichever shall first happen, thereafter terminable by either party giving to the other six months' notice in writing from any of the gale days hereinafter mentioned. The licensees will pay for such permission a rent at the rate of £12 per annum." The licensor also agreed to give the refusal of any other sites, which he might be desirous of letting for advertising purposes, to the licensees; not to terminate the agreement with the object of handing over the site to any other firm for advertising purposes; not to permit any other

persons, while the license remained in force, to post any bills on the wall of the picture house.

By an agreement in writing, dated the 29th August, 1913, made between William King, the defendant, and Thomas C. Flinn, as trustee for the Phibsboro' Picture House, Ltd., then about to be incorporated, the defendant agreed to let, and Flinn, as trustee, agreed to take a lease of the plot of ground at Madras Place for a term of 40 years from the 1st August, 1913, at the yearly rent of £117. The defendant further agreed to assign to Flinn, as trustee for the company, all his interest in the agreement of the 1st July, 1913, whereby the permission to affix bills was granted to the plaintiffs for four years at a rent of £12 per annum. It was also agreed that Flinn should, as soon as the new company was registered, obtain the acceptance and execution by the company of the proposed lease, "and the ratification of the said agreement of the 1st July, 1913."

On the 2nd September, 1913, the Phibsboro' Picture House, Ltd., was incorporated under the Companies Acts. Under the articles of association, the company was to adopt and carry into effect the agreement of the 29th August, and at a meeting of the directors on the 13th September, a resolution was passed ratifying and adopting the agreement. On the same day the lease from the defendant to the Picture House Company was executed. It contained no reference to the agreement of the 1st July.

The building of the picture house was completed in June, 1914. Acting under the agreement of the 1st July, 1913, the plaintiffs sent their men to post bills on the flank wall, but they were not allowed to do so by the Picture House Company. The plaintiffs posted bills two or three times, and the Picture House Company washed off the bills. The plaintiffs then brought the present action against William King.

The defence was that the defendant was not liable for the wrongful act of the company, who, having taken their lease with notice, were affected by the plaintiffs' rights, and were alone liable to be sued. In his evidence the defendant stated that he did his best with the company—he was one of the directors—to induce them to give effect to the agreement of the 1st July, 1913.

Gibson J. found for the plaintiffs, with £80 damages, and gave

K. B. Div. 1915.

ALLEN AND SONS *v.* KING

judgment for the plaintiffs for that amount, with costs. He delivered the following judgment :—

GIBSON J.:—

This is an action brought by the plaintiffs against Mr. King, who entered into a contract with them on the 1st July, 1913, on the ground that he, by assignment over to the Picture House Company, who had refused to allow the contract to be performed, had committed a breach of contract. The whole argument before me has proceeded on the basis, on the plaintiffs' part, that Mr. King is the only person who can be sued ; while on the defendant's part it is contended that, though the plaintiffs have sustained an actionable wrong, as is admitted, the only persons who can be sued are the Picture House Company. In these circumstances it is unfortunate that the Picture House Company are not represented in the litigation, because if I decide in favour of the defendant's view it would, or might, involve that the company are responsible. It is, therefore, a pity that the action was not framed in the form of a proceeding against the two sets of defendants, alternatively, as has often been done in English cases, where, if the Court at the trial considered that it was reasonable to join the defendant who succeeded, the plaintiff might be given the costs thus incurred against the defendant who was defeated. This course was not, however, adopted by the plaintiffs, who insisted throughout that the only person they were entitled to sue was Mr. King. The defendant, Mr. King, tried to bring in the Picture House Company, not on a motion to add them as defendants, which would be difficult or impossible to carry, but on a third party notice, founded on an alleged right of indemnity against them. Mr. Justice Boyd refused to accede to that application. I think he was right on the true construction of our Order. The Picture House Company were alleged to be primarily and exclusively liable, and King was alleged to be under no liability whatever. There was no question of indemnity on the argument before me. The Court of Appeal adopted Mr. Justice Boyd's view. The matter comes now to be decided before me on an argument in which Mr. King and the plaintiffs (Allen & Sons) have been heard, and the persons who may be

affected by my judgment have had no opportunity of vindicating their position. This has caused me much embarrassment.

The first thing to do is to construe the document of the 1st July, 1913, and form upon it a conclusion as to what the parties intended. They use throughout the expressions "licensor" and "licensees." What was contemplated was this: the licensees (Allen & Sons) were to be at liberty to post bills on the wall of the future picture house, in doing which they would incur expense; there was no obligation on the part of Mr. King to build; the right conferred on the licensees was for four years certain, and afterwards from year to year, determinable on six months' notice; the licensees were to pay a rent of £12 a year, and the rent was to commence from the 1st November, 1913, which might be long before the picture house was completed. To a certain extent the contract was one of a speculative character, by reason of the uncertainty of the completion of the picture house.

At the time this bargain was entered into there was a contract at £9 a year, which was surrendered by this new arrangement, and under that the rent was payable in advance. To such rent the Apportionment Act, as has been decided, was not applicable—a strong argument against the contract being determinable at will. The rent under the present contract is not payable in advance. In addition to the permission given to post bills for four years certain, there was a provision in the agreement whereby the licensor agreed to give the refusal of any other sites he might be desirous of letting for advertising purposes at reasonable and proportionate terms to the licensees. Clause 4 provides:—"The licensor agrees not to terminate this agreement with the object of handing over said site to any other firm for advertising purposes." This clause appears to relate to the period after the fixed term, when notice to quit is contemplated. No argument has been addressed to me on that point. It may be that it refers to the antecedent clause (3), which gives the refusal of any other sites. Clause 4 is rather ambiguous. The fair construction of clauses 1 to 4 is that they gave an exclusive right of billposting to the plaintiffs. In clause 5 the licensor agrees, while the licence remains in force, not to permit any other person or persons to post any bills on the wall of the picture house—a provision I regard

K. B. Div. 1915. ALLEN AND SONS v. KING. Gibson J.

as explanatory of plaintiffs' exclusive right—and he undertakes, if required by the licensees, to take proceedings against any person or persons who may, during the continuance of the licence, affix any bill, posting, or advertisement to the wall. Then comes a proviso of a restrictive character, that bills are not to be put on certain portions of the wall. As I have already said, the expressions throughout in that document are "licensor" and "licensees." The expression "rent" is also used, and there is a fixed term. What is the nature of the relation thus created? Mr. Henry argues that this was a bare personal licence, which could be revoked at any time at will (or possibly by death, if he is right); it could be revoked after half a year's rent had been paid, although the picture house had not been put up; and, he adds, this bare licence is necessarily determined by the assignment or letting of the premises on which the licence was to operate. That is so much opposed to common sense, and to the obvious meaning of the written contract, that effect, if possible, should not be given to that contention.

Mr. Henry, however, says that, although the licence was a bare licence determinable by assignment, it carries the extraordinary consequence that an action lies for breach of the contract, that is, that there is a right to determine the licence, and, at the same time, the licensees may have a right of action against the licensor if he does so; an irrevocable contract is attached by implication to a revocable contract created by the one instrument. I consider that between an irrevocable licence, and a licence for withdrawal of which the licensor can be sued, there is no real distinction; either way there is a right of action with identical damages. If the revocation of the licence is lawful, no action can lie for revoking it. A contract not to revoke the licence makes the licence irrevocable, unless the contract must be under seal. I am unable to see that in a contract like this there can be a revocable licence with an implied contract, inferred from the fact of the licence having been granted, that such licence is not to be revoked. I think it is an irrevocable licence as in *Hurst's Case* (1), but this is a stronger case, the contract being for four years certain at a stipulated

(1) [1915] 1 K. B. 1.

rent. What was necessary to enable the plaintiffs to obtain the advantage of that contract? They had to use the wall, which was part of Mr. King's premises; an act which but for the licence would be a trespass. In other words, they were entering upon Mr. King's premises, and they were able to justify that entry by the contract under which they paid £12 a year for the right. The contract is an irrevocable contract, and if violated gives a right of action. It relates to the use of the building, and it gives the plaintiffs the right of entering and using that building—there is no difference between using the outside of the wall and going inside. It is difficult to define what is the exact status of the licensees. Had they not (even apart from *Hurst's Case* (1)) a licence with an interest? Could King have pulled down the posters they had put up? My difficulty is caused by the authorities. If I had to decide the case according to common sense, I would find my duty easier. It is a hard task to pick my way through the authorities, but I think it best not to adjourn the case for judgment, thus putting the parties to unnecessary expense.

Let me now see how the authorities stand. In *Smith* v. *Lambeth Assessment Committee* (2), a case as to occupation for rating, which is the leading authority on this kind of law, it was held that, although the Smiths were in apparent possession of the bookstall, this possession did not create in them an occupation, and that they had only a right in the nature of a licensee's right. The Court looked to the real relation created, though the actual language used might have supported the other view. In *Wilson* v. *Tavener* (3), where most of the bill-posting cases were referred to at the Bar, Joyce J. held that a contract for an apparent yearly tenancy, the letting being for bill-posting only, created a licence which, though irrevocable during the period of the contract, could be determined at any time on reasonable notice. His view was founded entirely on the contract not being a contract for a letting proper. In *Kerrison* v. *Smith* (4) (where the Court was faced with the difficulty that the bargain was oral, and that

(1) [1915] 1 K. B. 1.
(2) 10 Q. B. D. 327.
(3) [1901] 1 Ch. 578.
(4) [1897] 2 Q. B. 445.

K. B. Div. 1915.

ALLEN AND SONS v. KING.

Gibson J.

Wood v. *Leadbitter* (1) was taken to be a conclusive authority) it was held that a contract of this kind was a mere revocable licence, but with the strange addition of an added implied term that damages might be recovered by the licensee for breach of the contract if the licence was revoked. To avoid injustice the Court discovered the existence of a second contract; here there is no such necessity. Taking cases on the other side, we have the decision of much weight given by judges of great eminence in *Hurst* v. *Picture Theatres, Limited* (2), where it was held, contrary to *Wood* v. *Leadbitter* (1) —*Hurst's Case* (2) was very similar to *Wood* v. *Leadbitter* (1)— that the licence granted to a person who entered a theatre on a ticket purchased by him included a contract not to revoke the licence arbitrarily during the performance. It was held, Phillimore L.J. dissenting, that the plaintiff, who had been turned out, had a cause of action. Buckley L.J. describes what was given to the plaintiff under the so-called licence as the grant of a right to go upon the premises for the purpose of enabling him to see the performance from the beginning to its end.

What is the nature of the plaintiffs' right under the written contract? Is it a demise, a letting under Deasy's Act, or is it only a special dealing in respect of premises under which the relation of landlord and tenant does not exist? There may be arguments in favour of a demise of a right, but the probable view of the parties was that the agreement did not properly create the relation of landlord and tenant. The question is one on which I would like, if it had been possible, to consider my decision. The English authorities, however, would be against the conclusion that there was a tenancy. If the case was one of landlord and tenant, with Mr. King as landlord, and Allen & Sons, tenants, I should think that King, who would be at liberty to alienate his reversion, could have transferred Allen & Sons' tenancy, and that if the purchasing reversioners infringed the right of the tenants they would have an action against such new owners, the Picture House Company, and not against the lessor, unless there was a breach of a covenant for quiet enjoyment. One of the strongest arguments against holding that the case comes within Deasy's Act is the onerous

(1) 13 M. & W. 853 (2) [1915] 1 K. B. 1.

nature of the covenants implied under that Act, and King would, I am sure, be surprised to be told that he could be hit by section 41 of Deasy's Act.

Assuming, as I do, that the relation of landlord and tenant does not exist, how does the matter stand? On that hypothesis there was a contract which purported to affect land, possibly within the Statute of Frauds. What was the position of Mr. King on the one side and of the transferees on the other? The Solicitor-General has argued that if the company can be affected by their knowledge of this arrangement between King and the plaintiffs, the company can be sued for violation of the plaintiffs' rights, and that, consequently, King is let free. Can the Picture House Company be made liable? My opinion of the situation—with an anxious desire to say nothing to prejudice the Picture House Company—is that where there is a binding contract inhibiting the use of land or affecting the use of land in favour of anyone, a person who deals with the land so affected is bound not to disregard that contract so far as it does not involve an affirmative dealing with the land. It has been decided in *Smith* v. *Colbourne* (1) (see also *Rogers* v. *Hosegood* (2)) that the doctrine of *Tulk* v. *Moxhay* (3) applies only to restrictive covenants. I think the provision in this case is within the principle, and is a negative stipulation to the effect that the premises shall be allowed to be used by Allen & Sons and nobody else. It does not assume any affirmative action on the part of King. All that he has to do is to remain passive. The contract affects land or the use of land, it is not merely personal, and therefore, in my opinion, the case comes within the principle of *Tulk* v. *Moxhay* (3), and I would be inclined so to decide, though the point seems novel and difficult. This is not an injunction suit, and the company are only lessees of King. Supposing the Picture House Company might be made liable—I do not like to say they are, as they are not before me—does that let the defendant out of responsibility? The Solicitor-General relied on *Williams* v. *Gabriel* (4), but that case depends on an entirely different doctrine. As to whether Bray J. was

(1) [1914] 2 Ch. 533.
(2) [1900] 2 Ch. 388.
(3) 2 Ph. 774.
(4) [1906] 1 K. B. 155.

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

Gibson J.

right or not in his conclusion, I express no independent opinion. In that case there was a covenant for quiet enjoyment, and the question was whether the original covenantor was liable for a disturbance caused by the assignees of the reversion, and Bray J. held he was not. Much of the decision recognizes that in certain cases the derivative owners may, by acts contrary to the covenant, make the original covenantor liable. I assume that Mr. Justice Bray's view is good law. There is much to be said in favour of the conclusion he arrived at, but I should not like, without examining the various authorities, to express confidently any opinion.

I proceed on the assumption that there is no demise, but that there is a contract in respect of these premises, which, known to the company, may affect the company, so that they could be sued for violating plaintiffs' rights. Does that absolve the defendant? It is not, it will be observed, a question of covenant at all. Mr. Henry argued that this was a personal contract which was incapable of transfer, relying on *Coleman* v. *Foster* (1), that a parol licence for an easement over land is revoked by a transfer of the land to a third party. But this is an irrevocable dealing in respect of land for a rent and for a fixed term. There are many contracts which are in law transferable. They will be found noticed in Leake's excellent work on Contracts, and some of them are mentioned in *Conlan* v. *Carlow County Council* (2), in my judgment. On the other hand, there are many contracts of a personal character which cannot be transferred. *Tolhurst's Case* (3), mentioned in *Conlan's Case* (2), is a case of transferable type; it related to a quarry. In my opinion there is nothing to prevent Allen & Sons from assigning the benefit of this contract to another company; and I do not see why the owner of the premises should not be at liberty to effect a transfer also, subject to existing rights. But if he transfers, does not the contract on his side remain intact, unless there was novation, which does not exist here? Here the company are only tenants, and never took an assignment of the contract. On what principle could they be exclusively liable, and the lessor be exonerated by transfer without the licensees' consent? This is not the case of a demise; it is

(1) 1 H. & N. 37.
(2) [1912] 2 I. R. 535.
(3) [1903] A. C. 414.

the case of a contract. How could the defendant escape from the liability under that contract without novation? I disagree with Mr. Henry that this is a revocable contract merely personal between the parties and determined *ipso facto* by assignment. It was a contract granting a right in respect of and touching land; the license was accompanied by an interest; it was irrevocable during the period of its operation; and it was a grant of a right within the meaning of *Hurst's Case* (1). Assuming, as I hold, that it did not create a demise, with regret I am of opinion that the defendant is liable. I cannot find on what principle he can escape if the relation of landlord and tenant does not exist. I asked the question as to whether there was any authority showing that, where there was no relation of landlord and tenant, one in a contract like this could proceed against the two persons, the original contractor and the transferee, and Mr. Wilson, I understood, said that there was no instance of the kind. There was no transfer here. The defendant cannot escape liability—if there is no relation of landlord and tenant—by showing that the company might be reached by an injunction suit. The contract, if transferable, was not negotiable, and the plaintiffs never accepted the company as undertaking King's contract. The company could only be attacked, not as contracting parties, but for not allowing the premises to be used in pursuance of contract rights affecting the premises.

Now, what about the damages? At one time I thought that they were grossly exaggerated, and I thought that a little counterpoise would be useful in the shape of the examination of another bill-poster on behalf of the defendant; but when the Dublin bill-poster appeared he repeated the prophet's conduct; like Balaam, he disappointed his employer. His opinion was that the rent was very low, and that the estimate by the plaintiffs' witnesses was not unfair. Mr. King has acted throughout in a most honourable and straightforward way. I am sorry that the plaintiffs proceeded against him alone, and that they did not also go against the Picture House Company. But he is personally answerable for the violation of his contract with the plaintiffs. I will assess the damages at £80—a moderate estimate.

(1) [1915] 1 K. B. 1.

K. B. Div. 1915.

ALLEN AND SONS v. KING.

The Solicitor-General (*James O'Connor K.C.*) (with him, *Herbert Wilson K.C.* and *Lardner*), for the defendant:—

The learned judge in the court below has found that the agreement or licence was binding on the Picture House Company. This is in our favour. But, notwithstanding that, he has also found that the acts of the Picture House Company constituted a breach of contract by the defendant. We quarrel with that conclusion. We say that if this agreement was binding on the Picture House Company, all acts by them were, *quoad* the plaintiff in this action, tortious acts, and that the defendant is not responsible. The agreement is an agreement to permit the plaintiffs for a term of four years to post their bills. That permission, on the assumption that the agreement is binding on the Picture House Company, is still in being and unrevoked. If we substitute for the word "permission" in the agreement, the word "right," it does not alter the essence of the agreement, and is rather stronger against the defendant. An agreement to give a right is not broken so long as the right itself exists. The Picture House Company, in acting as they did, were, so far as the plaintiffs were concerned, mere trespassers, and they were in no better position than if any outside party, utterly unconnected either with the plaintiffs or the defendant or the Picture House Company, tore down the plaintiffs' bills. If a covenant for quiet enjoyment were read into this agreement, it would be read as strongly as possible against the defendant, and nevertheless the defendant would not be liable for the wrongful acts of his assignees. This point is amply covered by authority: Williams' Saunders, 1845 ed., vol. ii, part 2, pp. 177–178: *Wotton* v. *Hele* (1); *Hayes* v. *Bickerstaff* (2); *Tisdale* v. *Essex* (3); *Dudley* v. *Folliott* (4); *Foster* v. *Pierson* (5); *Sanderson* v. *Mayor of Berwick* (6); *Wallis* v. *Hands* (7); Platt on Covenants, p. 313; *Williams* v. *Gabriel* (8).

What the plaintiffs are really endeavouring to import into

(1) Williams' Saunders, vol. ii, (1871 ed.), 524-525, note 3.
(2) Vaughan, pp. 118–119.
(3) Hob. 34.
(4) 3 T. R. 584.
(5) 4 T. R. 617.
(6) 13 Q. B. D. 547, at pp. 550–551.
(7) [1893] 2 Ch. at p. 83.
(8) [1906] 1 K. B. 155.

this agreement is a warranty by the defendant that the plaintiffs should not be interrupted in their enjoyment of the right, but no such warranty can be implied. Upon that question the case of *Porter* v. *Tottenham Urban District Council* (1) is valuable.

It was contended by plaintiffs' counsel that the mere assignment of the premises, the subject of the agreement, revoked the agreement, and if that were so I would concede that the defendant was responsible; but we say that the learned judge in the Court below was right in holding that the agreement was not thereby revoked. It is clearly binding on the Picture House Company, they having taken the premises with full knowledge of it: Foa, Landlord and Tenant, 3rd ed., pp. 382 et seq.; Leake on Contracts, 5th ed., p. 877; *Leech* v. *Schweder* (2). It is an agreement restricting the use of land, and is therefore binding upon an assignee with notice. See *Manchester Corporation* v. *Manchester Racecourse Co.* (3).

Moreover, we rely upon it as conferring an interest in land. See *Hurst* v. *Picture Theatres, Limited* (4).

J. Whitaker and *Brunskill K.C.* (with them *Henry K.C.*), for the plaintiffs:—

The agreement of the 1st April, 1913, was a mere personal licence not coupled with any interest in the land in regard to which it was to be exercised: *Wilson* v. *Tavener* (5); *Thomas* v. *Sorrell* (6); *Smith* v. *Lambeth Assessment Committee* (7); *Edwards* v. *Barrington* (8); *Warr* v. *London County Council* (9). This licence was determined by the assignment of the lands to which it was attached: *Coleman* v. *Foster* (10); *Wallis* v. *Harrison* (11); *Roffey* v. *Henderson* (12); *Judge* v. *Lowe* (13); and, by the demise to the Picture House Company, the licensor deprived himself of the power to fulfil his obligation to the plaintiffs, the licensees, under the prior agreement.

(1) [1914] 1 K. B. 663; [1915] 1 K. B. 776.
(2) L. R. 9 Ch. 463, at p. 475.
(3) [1901] 2 Ch. 37.
(4) [1915] 1 K. B. 1.
(5) [1901] 1 Ch. 578.
(6) Vaughan. 351.
(7) 10 Q. B. D. 327.
(8) 85 L. T. 650.
(9) 88 L. T. 689.
(10) 1 H. & N. 37.
(11) 4 M. & W. 538.
(12) 17 Q. B. 574.
(13) I. R. 7 C. L. 291.

K. B. Div. 1915.

ALLEN AND SONS v. KING.

The company having entered into possession under a lease which contained no reference to the agreement of the 1st July, are not bound on the ground of any personal equity to give effect to the licence, and, in these circumstances, the licensees are entitled to recover damages for breach of contract from the licensor: *Kerrison* v. *Smith* (1).

In any case, the company could not, by the adoption or ratification of a contract made before its formation between persons purporting to act on its behalf and the vendor, have incurred any contractual obligation to the vendor or to those upon whom he had conferred rights: *Kelner* v. *Baxter* (2); *North Sydney Investment and Tramway Company* v. *Higgins* (3).

Herbert Wilson K.C. in reply:—

Although not under seal, the licence of the 1st July created an interest in land in the nature of a restrictive covenant, and the Picture House Company having taken the subsequent lease with notice of that covenant are, on the principle of *Tulk* v. *Moxhoy* (4), bound by it, and are alone liable to the plaintiffs. [He referred to the note to *Spencer's Case*, 1 Sm. L.C., 11th ed., at pp. 82 and 90.]

Cur. adv. vult.

May 19.

DODD J.:—

The action, as it presents itself to my mind, is simply one for breach of contract, and I propose to approach the consideration of it from that side. The contract has been reduced to writing, and is contained in a document of the 1st July, 1913. The parties to the agreement are William King (the defendant in this action, called in the agreement "the licensor), and David Allen and Sons, Billposting, Limited (the plaintiffs in this action, called in the agreement "the licensees").

The construction of the contract is for the Court, and the intention of the parties is to be ascertained from within the instrument. But it is permissible to, nay, obligatory on, the

(1) [1897] 2 Q. B. 445.
(2) L. R. 2 C. P. 174.
(3) [1899] A. C. 263.
(4) 2 Ph. 774.

Court to know the relation in which the parties stood to each other at the time, to put it in a position to understand the dealing.

At the time of the agreement Mr. King was in possession and occupation of premises 34 Madras Place, and the plaintiff company had the use and sole right and privilege of using the whole of the surface wall of the premises for the purpose of suspending and exhibiting bills, placards, notices, and advertisements thereon, at a yearly rent of £9. The agreement could be terminated by six months' notice. But it had not been terminated on the 1st July, 1913, and the plaintiffs enjoyed at that date the privilege.

It was in contemplation of Mr. King to make extensive alterations in the premises, and that a new wall of ampler space should be erected in the place of the existing wall, but as to whether this new wall was to be built by a lessee of Mr. King's, or by Mr. King himself, does not appear in any way to which I can have regard.

Under these circumstances the present agreement was entered into between the parties to this action. The question turns practically upon the first paragraph, which is as follows:—

"The licensor hereby gives the licensees permission to affix bills, posters, and advertisements to the flank wall at side of picture house proposed to be erected at Royal Canal bank, and Madras Place, Dublin, for a term of four years from the 1st day of November, 1913, or the first day the said picture house shall be opened, whichever shall first happen."

The other clauses are not unimportant. As indications of intention they have some value. There is underlying the entire of them the assumption that Mr. King, under the new circumstances, will have the same power of control as under the old. He promises to give the refusal of any other sites he may be desirous of letting to the company. He promises not to terminate this agreement with the object of handing over the said site to any other firm for advertising purposes. He promises that he will not permit any other person or persons to affix any bill-posting to the said flank-wall, and that he will, at the instance and at the cost of the licensees, take proceedings against any such persons, the licensees indemnifying him against costs and expenses.

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

Dodd, J.

On the other hand, there is also underlying them the assumption that the licensor may deal with the property in any way he likes, provided the licensees' privileges under the agreement be in fact preserved.

The company's privilege has not been in fact preserved, and the materials for a common law action upon the old writ of assumpsit are all present. The old form of pleading was to state (1) the consideration, (2) the promise, and (3) the breach.

There is no question here as to the consideration. The company gave up its rights under the then existing contract, and consented that that contract should be rescinded. It promised to pay a rent of £12 per annum.

The whole matter turns upon what was the promise Mr. King made. It was in this part of the pleading, under the old system, that accuracy and care were required. The pleader might declare upon a higher obligation than the document warranted. He might, for example, as was done in the great edition of Bullen and Leake, allege a duty on a carrier "safely and securely" to carry a passenger, or he might understate the obligation. He might aver that the carrier undertook to take due and reasonable care about the transit of goods, though the law cast upon him a higher duty.

And in averring the breach there was need also for accuracy and care. It was not wise to limit the allegation by a "but on the contrary." The plaintiffs allege that the revocation of the licence by Mr. King's granting a lease of the premises to the picture-house company is the breach. On the other hand the defendant alleges that there must be an active interruption by the defendant, or by some person rightfully claiming under him, to constitute a breach. I think neither allegation is strictly accurate.

In consequence of the view so presented by each side, we have been invited to wander afield from the straight path of an action for breach of contract. Mr. Whitaker, as a guide, leads us through a maze of authorities as to the effect of an assignment of premises upon which a licence has been given. This brings us up against something which looks like a paradox. A man is liable to an action for revoking what the law permits him to revoke.

I think, perhaps, some of the apparent contradiction arises from an ambiguity in the words "revocable" and "irrevocable." These words have come into our legal phraseology from the conveyancing side of our jurisprudence. If a landowner grants by deed an easement, the grant is said to be irrevocable. He cannot defeat it. He may interrupt the user. But the grant remains, and damages for a breach would be recoverable merely up to the judgment, for the grant continues. If the thing granted be a licence, even though it should be granted by deed, he can in law revoke it, though in equity he may be ordered under certain circumstances specifically to perform it. When these words come into the commercial side of our jurisprudence, they have a different significance. A man may contract to give a licence for a period of years. He is under a legal obligation to continue it for the period. It is not accurate to say he may revoke the licence. He may break his contract, with such results as follow a breach of contract. He is answerable in damages once for all; just as in any other contract, say a contract of service for a definite period. The legal way of putting it, is, not that he has revoked the licence, but that he has broken his contract.

On the other hand, the Solicitor-General leads us through a maze of cases as to the meaning, force, and potency of covenants for quiet enjoyment; and Mr. Wilson, not to be outdone by his leader, points out the path which a court of equity would pursue in dealing with restrictive covenants.

I follow them wistfully, for these by-paths are interesting and attractive. But they do not lead in the direction which I think is the right one.

I desire, with all respect, to make one comment. Assuming everything the Solicitor-General asks me to assume, I should still hold that there was a breach of the most qualified covenant for quiet enjoyment. The history of that covenant in our law is interesting. At first it was thought to require a defect in the title to constitute a breach, then disturbance through defect in title was held sufficient, and finally it was extended to include disturbance simply by persons liable under the covenant. It did not include a case of an unexpected outburst of water, or a case of negligent taking down of premises held under a common landlord. But a

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

Dodd J.

case where the possession was disturbed by conflicting titles granted by the landowner was a typical case of breach.

Here the landowner, on the assumption I am dealing with, grants by one instrument a right to the Bill Posting Company to enter. By another instrument he grants a right to the Picture Company to prevent their entrance, and treat them as trespassers. Oh! but they have a good equitable right! they can bring a suit in equity! I should like to have heard one of the old judges on this. You covenant for quiet enjoyment. You give the man a suit in equity! Is this quiet possession? And to Mr. Wilson, with all respect, I say that the conclusion from all his authorities is this: a court of equity will not restrain an original lessee who has not himself been guilty of a breach, but it will leave the landowner to his action at law upon the covenant.

I have to find out what was the promise Mr. King made to the plaintiffs. Let us try it negatively. Did he promise that he would "so long as he was the owner of the premises" give the permission? There is no such qualification. He gives permission to affix bills to the new wall proposed to be erected when the new picture house, of which the wall formed part, was to be open for business.

The promise is not that those claiming under him will give the permission. Still less is the promise that he and those claiming under him will not interrupt the plaintiffs in the enjoyment of such permission. The promise is not that he will not do something, it is a promise that he will do something, that is "give permission." It is, upon my construction of the contract, an absolute and unqualified promise; a promise that he, the party contracting, will give permission. If he is unable, either by not having power to do it at the time he makes the contract, or by depriving himself of the power after he has made the contract, or by not being able to control those whom he thought he could control, then he has not kept his promise, and he is liable in damages for a broken contract.

It is by way of apology, and not by way of complaint, that I suggest that this is the true method of proceeding. Having arrived at that conclusion upon the document itself, I next proceed to search whether there are any authorities that would conflict with such a construction. Having regard to the line of argument

adopted by each side, it was not within their duty either to seek for or to produce such authorities. My apology is for citing authorities which were not cited in the argument.

With some diffidence, as the case was, for the reasons I have mentioned, not alluded to, and bearing in mind the caution that no two cases are alike in their facts, I draw attention to the case of *Smart* v. *Jones* (1). In that case A agreed with B that B might dig and carry away cinders from a certain cinder tip, the property of A, B paying a certain price per ton. The reason why the defendant did not perform the contract was because the land and the cinders were not his property. There were giants in the earth in those days. The case was argued by Bovill and Gifford on the one side, and Coleridge and Cotton on the other. It was decided by Erle C.J., Williams, Willes, and Keating, JJ. It was contended that the right could only be conferred by deed. That was overruled. One of the points for demurrer was that, as there was no warranty of title, there could be no damages. That, too, was brushed aside. I cite the case, however, for the construction put upon the agreement. It was held that it was an absolute promise. Chief Justice Erle puts it thus:—"It seems to me to be simply a question whether, where a party has entered into a valid contract, and has broken it, an action will lie for such breach . . . When Lewis, in pursuance of the agreement, went to the place to exercise his right under the agreement, he was prevented from doing so. Suppose the place where the cinders were had been fenced round, and the gate giving access to it had been locked, and the agreement had been that, in consideration of certain payments to be made by Lewis, the testator promised that the gate should be open so that Lewis might enter and take the cinders, it would be quite immaterial whether the gate was locked by the testator or by a third person. A man may if he pleases contract to sell another man's goods, or to do a thing which he cannot do; still, if he makes the contract or the promise, he is liable for the breach of it." Mr. Justice Williams entirely agreed with the Lord Chief Justice in the construction he put upon the instrument. And Mr. Justice Willes puts clearly in respect of that

(1) 15 C. B. (N. S.) 717.

K. B. Div. 1915.

ALLEN AND SONS v. KING.

Dodd J.

contract the view I am endeavouring to express as to this one. He says: "If that [the agreement] is to be construed to mean merely that the seller is not to interfere actively to prevent the purchaser from taking the cinders, there is an end of the matter . . . It is necessary to put upon the agreement a more extensive, because a more reasonable, construction, of which it is well susceptible. The seller agrees that the buyer shall have the article contracted for; and the latter, through the default of the former, has been unable to obtain it." What the default is he mentions later on: "The plaintiffs' case is founded upon a contract and the breach of it, not alleging any fixed interest in an incorporeal hereditament, but alleging that the vendee has not had that which he bargained for." Mr. Justice Keating gave judgment to the like effect.

The case differs from the one before us. In that case there was a right of entry to take something from the premises. In this case the right is a right of entry to put something on the lands. I think that is a distinction without a difference. Again, that was a case where the vendor had not that which he contracted to give. Here the defendant had full power to give at the time he made the promise. How can he rely upon anything he subsequently did which disqualified him from giving what he had promised to give? In this connexion the cases cited by Mr. Whitaker are authoritative. If a man who has given a licensee a right of entry, afterwards parts with the property so as to prevent him from carrying out his promise, he is answerable as for a breach of contract. But the breach is not that he parted with the property, but that he did not continue to give the permission.

In *Wall* v. *The City of London Real Property Co., Ltd.* (1) the agreement was to surrender portion of the premises, and that the landowner should make alterations and make an entrance, and grant to the plaintiff the use of the entrance. The defendants made the entrance, and put the plaintiff in possession of it, but the day after he was stopped by third parties. An action was brought "for not granting the use of the passage." The contract

(1) L. R. 9 Q. B. 249.

provided for a lease to be made at a peppercorn rent, and the lease so to be made would presumably contain a qualified covenant for quiet enjoyment such as the Solicitor-General loves. Mr. Justice Blackburn held that the promise was absolute. He said: "It appears on the face of the agreement that, at the time when the defendants agreed forthwith to give and grant to the plaintiff the use and enjoyment of the entrance, they were purchasers who had expected to have a title conveyed to them, but had not got it; and the plaintiff was, in consideration of this grant, immediately and without waiting to see what title they should get, to give up his property. It is impossible to suppose that the plaintiff intended to part with it merely for a promise that the defendants should hereafter grant him this entrance if they should succeed in getting title thereto, and that, if they could not, he was to have nothing. We think that we may well hold that the true meaning of this particular agreement is that the *promise as between the plaintiff and defendants was absolute*, but that the covenant to be inserted in the lease, which would run with the land, and regulate the rights of the assignees of the lease, was to be restricted."

That, again, was a case where the landowner could not give what he purported to give. It is for the construction of the contract I cite it. The Court held that it was a case for damages.

There is one case, a very recent one—*Porter* v. *Tottenham U.D.C.* (1)—which seems to favour a more restricted promise than that which commends itself to me in this case. It was an interesting litigation. The Tottenham Urban Council, by an agreement in writing, entered into a contract with the plaintiff that he should erect buildings for the defendants upon a site belonging to them, to be completed within ten months after the date of the contract, and that he should commence work and be at liberty to enter upon the site forthwith. The owner of the soil of the street alleged that the grass margin had not been dedicated by him to the public as part of the roadway, and prevented the contractor from having access to the road, and there was no other access. The Urban Council proceeded to restrain the owner. He took the case to the House of Lords. He was beaten, and the plaintiff

(1) [1914] 1 K. B. 663; C. A. 31 T. L. R. 97.

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

Dodd J.

then recommenced work, and he sued the Urban District Council for damages. The King's Bench Division, consisting of Ridley and Bankes JJ., held that there was no obligation, express or implied, upon the defendants to indemnify the plaintiff against the loss caused by the wrongful interference of a third party with the means of access to the site. The statement of claim was for damages "for breach of the defendants' implied contract to give him free and uninterrupted access to the premises." The case was carried to the Court of Appeal, and I cite the careful pronouncement of Lord Justice Buckley as to what was the duty of the Urban District Council. He says:—"The proposition which the plaintiff sought to set up was that if there was a contract between A and B to do work, and C asserted a right to stop B, and prevent him from working, A was then liable to indemnify B. He thought that the true view was that if C intervened it was a common misfortune for A and B. In his judgment the building owner owed a duty to the builder to do all acts which were within his power for the purpose of giving the builder uninterrupted access to the site, but in the present case a third party had intervened."

That was a qualified duty, and that duty was not broken. I may observe that the Court would not have held that the defendants had fulfilled their contract if the access had been hindered by one to whom they had given a right to hinder after they had made the contract with the plaintiff. The facts that pointed to a qualified duty in that case are in strong contrast with the facts in this case, which all point, as I think, to an absolute promise.

As to the construction of the contract, therefore, my view is not modified by the authority I am citing.

In the result, therefore, I can find nothing in the books which induces me to modify, but a good deal which confirms, the interpretation I put upon the agreement in this case apart from authority.

If the true interpretation of the contract be what I have suggested, then it is obvious that there was a breach. All that the defendant offers is an excuse for not performing it. He cannot say, "I secured your privilege in the lease I made." That, even if the lease contained a covenant by the company that they would carry out the contract, would be no answer, unless the

company did carry it out. The plaintiffs could not even sue upon such a covenant, not being party or privy to it. Nor could they sue upon an assignment by the defendant of the agreement he made with them. If the plaintiffs had accepted a promise of the company, in lieu of the promise of the defendant, by a competent act of novation, the defendant would have been discharged from his obligation to the plaintiffs, but until that happened the defendant is bound. Still less is it an answer to say, "The company was bound in equity to carry out my bargain with you. You can sue them in equity." What the plaintiffs bargained for was not an action in equity. They bargained for permission to put up posters; their right is founded on contract; they are not to be relegated to the conscience of a limited company.

I think, therefore, the judgment of Mr. Justice Gibson was right.

KENNY J.:—

I think that the only essential point of difference between the other members of the Court and myself is whether there has been a breach of the contract embodied in the document of the 1st July, 1913, by the defendant or anyone authorized by him. That the object of the licence granted by that document to the plaintiffs by the defendant has been defeated in a very flagrant manner must be obvious to anyone who has heard the facts of this case. But to render the defendant liable in respect of the interference with the plaintiffs' rights under that agreement it is necessary to establish that the act of interference was the direct act of the defendant, or one which, under the circumstances, he must be deemed to have authorized. If it were otherwise, the defendant would be in the position of an insurer of the plaintiffs against acts, no matter how tortious they might be, or by whom committed or under what circumstances of accident or otherwise, and I am not sure, indeed, that a claim to that extent was not made at the Bar. There is nothing to prevent a person entering into such a contract of insurance if he be unwise enough to do it, but the facts in the case before us, in my opinion, afford no ground for such an

K. B. Div. 1915.

ALLEN AND SONS v. KING.

Kenny J.

extension of the meaning and purpose of the licence of the 1st July, 1913. In the view I take, the defendant is not, on a transfer of his estate, released from all obligations arising out of the grant of that licence, and he would not, in my opinion, necessarily escape liability on foot of it by parting, either by assignment, lease, or otherwise, with the possession of the premises to which the licence was attached. The test of liability is whether the acts of interference which are the foundation of the injury can be properly attributed to the defendant himself or to persons authorized by him. And it seems to me, having regard to the authorities, that when the question arises whether the defendant is to be deemed to have authorized the acts of interference, these acts must be of such a character as to be founded on a claim to commit them as of right as between the defendant and the third party. In other words, if the particular acts are not referable to a right, express or implied, conferred by the defendant, they cannot be deemed to have been authorized by him.

Now, in considering the legal bearings of this case, I am quite willing to place the licence of the 1st July, 1913, on a higher plane than that to which it is entitled. As it is, it purports, by a document not under seal, to give exclusive permission to the plaintiffs to affix their posters to the flank wall of a "picture house," the building of which was then contemplated, for a term of four years from the 1st November, 1913, or the first day the Picture House should be opened for business, at a rent of £12 a year. I shall, for the purposes of argument, treat this licence as one under seal, and with a covenant by the defendant for quiet enjoyment without interruption by the defendant or any person claiming from, under, or through him. A licence so created would be irrevocable, and, I think, we are all agreed that Gibson J. was right in point of law in holding that such a licence as that in the present case, where it was coupled with an interest, was practically irrevocable, and that he could have come to no other conclusion having regard to *Hurst's Case* (1) in the Court of Appeal in England. A licence may be irrevocable in more senses than one. It may be absolutely irrevocable in the sense that any interference

(1) [1915] 1 K. B. 1.

with its exercise would be restrained by injunction in order to maintain the grant, or it may be substantially irrevocable where, though from its form or nature revocable as a licence, the revocation affords a right of action for damages in respect of the breach of an implied contract for its continuance. The grant of a licence under seal purporting to be irrevocable would be an example of the former,—so would a licence purporting to be irrevocable, though not under seal, if it be coupled with an interest. *Kerrison* v. *Smith* (1) affords an illustration of the latter. Where the licence is an irrevocable one either by reason of the grant being under seal or, though not under seal, being coupled with an interest as in the case before us, I think there can be no doubt that the licensee, if disturbed by anyone claiming otherwise than by paramount title—or possibly than as a purchaser without notice—could successfully assert his rights by action for an injunction and damages, or for either. Therefore, in the present case the Picture House Company having taken their lease of the 13th September, 1913, with express notice of the plaintiffs' irrevocable licence, could, in my opinion, have been restrained by injunction from obstructing the plaintiffs' user, and could also be sued for damages for their interference with the plaintiffs' rights. These are what I conceive to be the legal relations of the plaintiffs and the Picture House Company *inter se*; but the determining of such relations, although not unimportant in the consideration of the question of the liability of the licensor arising on his grant of the licence, still leaves that question open. As I have already said, I shall consider it from the point of view of a licence under seal, with a covenant for quiet enjoyment without interruption by the defendant or any person claiming from, under, or through him. A more extensive covenant than that would not, in my opinion, be implied from the mere grant under seal of such a permission or easement as that conferred by the document of the 1st July, there obviously being nothing to indicate an intention to indemnify the licensee against the acts of all the world. A covenant for quiet enjoyment in the form I have indicated was

(1) [1897] 2 Q. B. 445.

K. B. Div. 1915.

ALLEN AND SONS v. KING.

Kenny J.

formerly held as extending to wrongful disturbances or evictions by strangers, but it is now quite settled that such a covenant will afford protection only against disturbance or eviction by such as have lawful title. I need not refer to the cases establishing this proposition. They are collected in Platt on Covenants, p. 312; Elphinstone on Deeds, p. 553; 2 Roscoe on Evidence, 18th ed., p. 745; 1 La Touche's Furlong, p. 494; and other text-books, under the heading "Covenant for quiet Enjoyment." And the reasons for the law not adjudging that the wrongful acts of strangers are covenanted against will be found in the judgment of Vaughan C.J. in *Hayes* v. *Bickerstaff* (1), at p. 123, where it is said that "When a man covenants his lessee shall enjoy his term against all men, he doth neither expressly covenant for his enjoyment against tortious acts, nor doth the law so interpret his covenant." Of course, a covenant may be so worded as to extend to tortious disturbances, as in *Chaplain* v. *Southgate* (2); but a covenant in general terms to indemnify against all persons would be confined to lawful interruptions, because, as Lord Ellenborough states in *Nash* v. *Palmer* (3), at pp. 379-80, "it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest."

If, therefore, the covenant, for a breach of which it is sought to make the covenantor liable, be one which is restricted to interruptions by the covenantor himself, or by his authority, or by a person lawfully claiming through him, the question remains, to what *acts*, committed by a person lawfully claiming through him, does such a covenant extend? "Lawfully claiming" means lawfully claiming in point of title; and, so far as the Picture House Company in the present case is concerned, I am of opinion that, as lessees from the defendant, they may be regarded as, *pro tanto*, assignees, and lawfully claiming through the covenantor. But, though lawfully claiming title through him, can their action towards the plaintiffs be considered as flowing from that title, or referable to any authority conferred

(1) Vaughan, 118.
(2) 10 Mod. Rep. 384.
(3) 5 M. & S. 374.

by the defendant? It was not the lease executed by the defendant to them that was the foundation of their action, or could afford any justification of it, and it is not enough to say, as has been said here, that the mere execution by the defendant of the lease was in itself a revocation of the licence because it put it in the power of a third party to commit what was a tortious act. There is no evidence that the tortious act was ever contemplated by the defendant when the lease was made, and it is abundantly clear, and is so found by Gibson J., that, after the execution of the lease, the defendant did what he could to give effect to the plaintiffs' rights. How, then, can it be said that the interference with the plaintiffs' rights under the agreement was the act of the defendant, or was authorized by him?

It seems to me that the authorities establish that to make a lessor or licensor liable under such circumstances on the implied agreement arising from the grant of the licence the particular interference must be claimed as a right conferred by the licensor. In other words, the act must be found to be one authorized by him. In *Sanderson* v. *The Mayor of Berwick* (1), there were two leases of different dates by the defendants—one in 1865, and the other—to the plaintiff—in 1875, the latter containing a covenant for quiet enjoyment. The earlier lease of 1865 conferred a right on the lessee—one Cairns—to use the drains through the plaintiff's land for the purpose of carrying away water from his own land, and in the course of exercising that right, Cairns, by an excessive user of the drainage system, flooded the plaintiff's lands. In an action by the plaintiff against his lessor to recover damages for breach of covenant for quiet enjoyment, it was held by the Court of Appeal, consisting of Brett M.R. and Bowen and Fry L.JJ., that the defendant was not liable. Fry L.J. delivered the judgment of the Court, and at p. 550 says, "It appears to us that the defendants are not liable on the ground of causing or permitting the injury, for Cairns, and not they, caused or permitted it. They are not liable on the ground that it is a disturbance by a person lawfully claiming under them, *because the lease gave Cairns no lawful claim to do the act complained of.*" I consider that

(1) 13 Q. B. D. 547.

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

Kenny J.

Cairns was in much the same position as the Picture House Co. in the present case, with the exception—which I am of opinion makes no difference—that the instrument under which he claimed was prior in point of date to that of the plaintiff. He claimed through the defendants, and so far as title was concerned lawfully claimed through them—but his acts were acts outside of that lawful claim and not referable to any authorization by the defendants. The law is laid down—if possible with greater clearness—in *Harrison* v. *Muncaster* (1), where there were two leases, as in *Sanderson* v. *Mayor of Berwick* (2), and where the decision and the language of Fry L.J. in the latter case were considered. The Court consisted of Lord Esher M.R. and Bowen and Kay L.JJ., and they drew a clear distinction between a lawful act and its consequences, and as to what was in the contemplation of the parties when the contract was entered into, and what was not a necessary or probable consequence of the act. At pages 682 and 685 the Master of the Rolls discussed the meaning of the words "claiming under him" as used by Fry L.J. in *Sanderson's Case* (2), and says that he has "no doubt that the proper meaning of those words is,—by the acts of the lessor, or of those claiming under him the right to do the acts which caused the interruption, . . . it was done by a person claiming through the landlord a right to do it, and, therefore, if it can be said that that act was, within the meaning of this covenant, the cause of the interruption, then the plaintiffs will succeed." The Court accordingly held that the particular act which caused the injury to the plaintiff was not an act contemplated by the parties or attributable to the defendant, or done in any sense with his authority. Bowen L.J., at p. 689, is emphatic in his opinion that it would be unreasonable to suppose that a covenant for quiet enjoyment in the absence of express words would make a landlord liable for every possible consequence which might happen from any acts done under colour of his title by any person who claimed under him. To the like effect is *Porter* v. *Tottenham Urban Council* (3).

(1) [1891] 2 Q. B. 680.
(2) 13 Q. B. D. 547.
(3) [1915] 1 K. B. 776.

I shall refer only to one other authority, namely, *Williams* v. *Gabriel* (1), a case which is important in this, that the act which was alleged to have caused the injury was committed by an assignee of the *reversion*—and not by a prior lessee. It was there held that an act of demolition by the assignee of certain adjoining premises under an order under the London Building Acts, which act caused injury to the plaintiff, could not be regarded as expressly or impliedly authorized by the lessor,—and Lord Esher's interpretation of the words "lawfully claiming under the lessor" was adopted as restricting the acts to acts the right to do which was expressly or impliedly authorized by the defendant.

It has been argued that the mere making of the lease to the Picture House Company was in itself a breach of the agreement for the licence. I have been quite unable to follow that argument; and, in my opinion, *Coleman* v. *Foster* (2) cannot be said to support it. If it were sound, the defendant after the grant of the licence could never with safety have made any disposition of the property affected by the licence. I put the cases of a sale in the Landed Estates Court, or a judgment mortgage, or bankruptcy. Would such involuntary dealings with the property as these amount to a breach of the licence? I was told that such was the plaintiffs' contention—but I can only say that I see no ground whatever for it. If there were any basis for it, I would have expected the point to have been made in *Williams* v. *Gabriel* (1), where the whole reversion was parted with. I have been considering the question of the defendant's liability as arising from the alleged breach of a contract under seal, and if I am right in my conclusion that the defendant could not in the circumstances be made answerable for the tortious act of a third party, it is *a fortiori* that he would not be liable where the contract, not being by deed, is not of so high a character.

While, therefore, there can be no doubt that the plaintiffs have suffered a wrong at the hands of the Picture House Co., I can find no evidence in the case to show that the defendant is legally responsible for it. It was not committed directly by him, and

(1) [1906] 1 K. B. 155. (2) 1 H. & N. 37.

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

Kenny J.

beyond the fact that the wrongdoers claim under him as sub-lessees, there is not a particle of proof that it was committed by his authority. Indeed the evidence establishes what Gibson J. has found as a fact, that the defendant did what he could to give effect to the plaintiffs' rights, which were grossly infringed. The Picture House Co. took their lease of the 13th September, 1913, with full notice of the licence. The agreement of the 29th August, 1913, with the promoter refers to it and provides for the defendant conveying all his interest under it to the promoter as trustee for the new company which was registered on the 2nd September, 1913, with articles of association containing a provision for carrying the agreement into effect. Furthermore, at a meeting of the directors of the company, held on the 13th September, 1913, the agreement was ratified and adopted. There is not a suggestion throughout the evidence that the defendant individually countenanced the infringement of the licence, and in my judgment he cannot in any aspect of the case be held responsible for the wrongful act of the Picture House Company.

I consider that judgment should be entered for the defendant with costs.

MADDEN J.:—

The defendant, William King, was at the date of the agreement of the 1st of July, 1913, the owner of property adjoining the Royal Canal, on which there were sites suitable for the exhibition of those bills and posters which form a feature of the outskirts of Dublin more conspicuous than attractive.

The agreement of the 1st of July, 1913, is made between William King, called the licensor, of the one part, and the plaintiffs in this action, David Allen & Sons, Bill-posting, Ltd., called the licensees, of the other part. It is in the following terms :—" The licensor gives the licensees permission to affix bills, posters, and advertisements to the flank wall at side of picture house proposed to be erected at Royal Canal Bank and Madras Place, Dublin, for a term of four years from the 1st day of November, 1913, or the first day the said picture house shall be

opened for business, whichever shall first happen, thereafter terminable by either party giving to the other six months' notice in writing from any of the gale days hereinafter mentioned. The licensees will pay for such permission a rent at the rate of £12 per annum," payable on the days mentioned in the agreement, which contains some provisions in the interest of the licensees which are of no importance in relation to the present case.

A company was formed for the purpose of erecting the picture house referred to in this agreement as proposed to be erected. An agreement dated the 29th of August, 1913, was made between William King, of the one part, and Thomas C. Flinn, as trustee for the Phibsboro' Picture House, Limited, of the other part. This was an agreement for a lease from King to Flinn, as trustee for the new company, of a plot of ground adjoining Madras Place for a term of forty years from the 1st August, 1913, at the rent of £117 per annum. It was a term of the agreement that King should assign to Flinn, as trustee for the company, his interest under the agreement of the 1st of July, 1913, whereby the right to fix bills was granted for a term of four years at the yearly rent of £12. It was further agreed that Flinn should, as soon as the new company should be registered, obtain the acceptance and execution by the company of the proposed lease, and the ratification of the agreement of the 1st of July, 1913.

The company was registered on the 2nd of September, 1913. Under the articles of association the company was to do all acts that might be necessary to adopt and carry into effect certain specified agreements, amongst which was the agreement which I have referred to of the 29th August, 1913. The agreement of the 1st of July is not referred to in the articles.

At a meeting of the directors, at which Mr. King was in the chair, it was resolved that the agreement of the 29th of August should be ratified and adopted, and that the seal of the company should be affixed to the indenture of lease referred to in the agreement.

The lease from King to the Picture Company was executed on the 13th of September. It contains no reference to the agreement of the 1st of July. The building of the picture house was completed in June, 1914.

K. B. Div. 1915.

ALLEN AND SONS v. KING.

Madden J.

Mr. King, who was the chairman of the company, states in his evidence that he did his best with the company to have the agreement of the 1st of July acted on. In this he was opposed by the managing director, Alderman Farrell, whose opposition was successful, for when the plaintiffs' men were sent to put up posters on the wall they were not allowed to do so. The plaintiffs' manager says that he saw Alderman Farrell; that they posted bills two or three times, and the company washed them away.

The case before us is an action against Mr. King for breach of the contract contained in the memorandum of agreement of the 1st of July, 1913. The plaintiffs' case, shortly stated, is as follows:—(1) The legal effect of this agreement is a licence by which permission is given to the licensees to do certain acts on the property of the licensor; (2) this licence is, in its nature, irrevocable; (3) the licence was revoked or annulled by the act of the licensor, when he executed to the Picture Company a lease of the property to which the licence was attached; (4) the liability of the licensor in damages to the licensees for the revocation of the licence has not been affected by anything that has occurred in relation to the formation of the Picture Company.

What, then, is the legal character of the memorandum of agreement of the 1st of July, 1913? This document is in form a licence. It is expressed to be made between King, described as "licensor," and Allen and Sons, described as "licensees." By it the licensor gives permission to the licensees to post bills on a wall proposed to be erected on the property of the licensor. The giving of such permission is the proper subject-matter of what is known to law as a licence, for it renders lawful as against the licensor an act that would otherwise amount to an actionable act of trespass.

Why should any different effect or operation be given to this document than that which is expressed on the face of it? We have been asked to give it a conveyancing operation, by way either of grant of an easement, or of demise.

As to its operating as a demise, it is sufficient to say that there are no words in the agreement capable of such a construction. The annual sum of twelve pounds to be paid by the licensees to the licensor is called "rent." But any inference that might

otherwise be drawn from the use of this term is negatived by the description of this "rent" as paid "for such permission. . . so long as this licence remains in force."

In *Wilson* v. *Tavener* (1) the document in question was not, in terms, a licence. It was an agreement by which the defendant agreed to let the plaintiff erect a hoarding for bill-posting on his property, which was to be erected and repaired at the expense of the plaintiff, at the yearly rent of ten pounds. It was held that the document was in effect a licence. Joyce J. says, "I have arrived at the conclusion that these documents did not confer on the plaintiff any right to the exclusive possession of any property or building of the defendant, and therefore I think that there was no demise or lease, and that the relation of landlord and tenant was never created between them."

In *Smith* v. *Lambeth Assessment Committee* (2) the question for decision was the liability of the plaintiffs to be assessed for poor rate in respect of their occupation of a railway station under an indenture of agreement with the railway company. Under this indenture the South-Western Railway Company granted to Messrs. Smith & Son, therein called the "tenants," the "sole and exclusive license and privilege" of selling newspapers, books, &c., at the stations of the company, and also full liberty for the tenants, subject to the prescribed approval, to erect bookstalls on the platforms and exhibit advertisements on the walls of the stations, with full and free ingress and egress for the "tenants," their servants and agents. There was a provision that if certain monthly rents or quarterly payments, due from the plaintiffs to the company, should be in arrear, they should be recoverable by the company, in addition to any other remedies "by distress as in the case of rent in arrear." The Court of Appeal, affirming the decision of the Queen's Bench Division, held that the effect of the indenture was simply to grant a licence. The grantees were called the "tenants." Here they are called "licensees." "Parts of the indenture look like a demise; others are wholly inconsistent with an intention to create an interest of the kind." There was no exclusive occupation by those who are called "tenants," only

(1) [1901] 1 Ch. 578. (2) 10 Q. B. D. 327.

K. B. Div. 1915.

ALLEN AND SONS v. KING.

Madden J.

"for the sake of convenience." The Court in that case held the document before them to be, in effect, that which the agreement before us is in express terms, that is to say, a licence, conveying no right to the exclusive occupation of the premises in respect of which it was given, and, therefore, not an instrument of demise.

As regards the suggestion that the agreement should be read as the grant of an easement for a term of four years, there is even less foundation for this view than for the construction by which it is read as a demise, for the word "rent," if it were unexplained, might support the latter contention. It may be that the common law doctrine requiring a grant of an incorporeal hereditament to be under seal, does not, in this country, since Deasy's Act, apply where the grant is for a term of years, at a rent. But there is nothing in either the wording or the nature of the document before us to suggest that it should be read as a grant of an easement. It is in plain terms a licence, and I am at a loss to conceive why we should exercise our ingenuity for the purpose of giving to it a different character or effect, whether by way of demise, restrictive covenant, or grant of an incorporeal hereditament.

It has been contended that the agreement of the 1st July, although in terms a licence, was in reality part of an agreement between King and Allen & Sons, and that there has been no breach of this agreement on the part of King. The Solicitor-General contended that the contract, as deduced from the documents in the case and the acts of the parties, was that whatever rights Allen got under the agreement, by way of licence or otherwise, they were to be enforceable only against a company the formation of which was within the contemplation of both parties to the agreement. There is, I think, evidence that the licensees were aware that the privilege granted by the agreement of the 1st July was to be exercisable in relation to a wall which was to be erected by a picture-palace company, then in course of formation, which wall would be the property of that company. This is described in the agreement as "the flank wall of side of picture house proposed to be erected at Royal Canal bank," and the plaintiffs, in a letter to King dated the 17th June, 1914, wrote, "As you know perfectly well, we have

done nothing outside the terms of our agreement, which, although made with you, was, as you yourself stated dozens of times, made on behalf of the Picture House Company about to be formed, and the fact of our having rights in the matter is recognized by a letter from the secretary of the Phibsboro' Picture House, Ltd., dated 16th inst." It is possible that Allen & Sons have rights enforceable against the Picture House Company. I will assume, for the purposes of my judgment, that the latter company, by their course of dealing with King, with knowledge of the agreement of the 1st July, had rendered themselves equitably bound to give effect to this agreement. If this be so, the remedy of Allen & Sons would be a suit in equity, in which they would obtain an injunction restraining the Picture Company from interference with the exercise of a right affecting the property acquired by them with knowledge of the existence of the right, and damages for the loss sustained by them.

But I find no evidence that the creation of such an equitable right against the company about to be formed was in contemplation of the parties to the agreement of the 1st July—and this is necessary to support the Solicitor-General's argument. The reference to "the picture house proposed to be erected" is simply introduced by way of description and identification of the particular wall on the property of the licensor in respect of which the licence is given. King does not purport to contract on behalf of a Picture House Company. In fact, there was no such company in existence. I can find no evidence that it was part of the transaction, as understood by the parties, that the company, when formed, was to be placed under any obligation to the licensees, much less that the obligation, as against the company, should be substituted for the personal liability of King to make good the agreement into which he had entered.

There is no evidence of novation. Nothing was said or done by Allen & Sons subsequent to the contract of the 1st July which could be submitted to a jury as evidence that they accepted the equitable liability of the Picture House Company in substitution for the right, legally enforceable, under the licence granted by King, in exoneration of King. The argument, if it is to

K. B. Div. 1915.

ALLEN AND SONS *v.* KING.

prevail, must be founded on the original contract, and it was so put by the Solicitor-General, when he asked us to hold that there was an agreement that Allen & Sons' rights under the agreement were to be enforceable *only* against the Picture Company when formed.

Madden J.

Mr. Herbert Wilson contends that the licence, though not under seal, is of the nature of a restrictive covenant, the obligation under which passed to the Picture Company under the lease, and that the absence of a seal is not now a fatal objection to this view of the contract. But even if, under this view of the case, Allen & Sons have rights against the company, I cannot see how, in the absence of novation, the existence of such rights can release King from his liability to make good the licence granted by the agreement of the 1st July,

What, then, was the character of the licence given by the agreement of the 1st July? It was not under seal, and it was not coupled with an interest in the land in regard to which it was exercisable. I am not concerned to consider the private character of this licence at common law, or whether, before the Judicature Act, an action at common law could have been brought, founded on the revocation of the licence. I rest my decision on the doctrine established by the decision of the Court of Appeal in England in *Hurst* v. *Picture Theatres, Ltd.* (1). That case decides that an action lies in this Court for breach of a contract for valuable consideration, in the form of a licence, although the licence be not under seal, and be unaccompanied by any interest in the land in regard to which it is exercisable. This conclusion may be arrived at in either of two ways—either by adopting and applying the equitable principle by which a party to a contract for valuable consideration will be restrained by injunction from breaking his contract, or by reading a licence to be enjoyed for a certain period as importing a contract not to revoke the licence before the termination of that period. For myself, I may say that I prefer to rest the decision on the former ground. It appears to me to be a more direct application of the principle laid down by the Judicature Act that the rules of equity are to prevail, and

(1) 1915 1 K. B. 1.

it does not involve the introduction of a legal fiction by which a contract is implied which was not in the contemplation of the parties to the agreement. But it is not necessary to discuss this question, for the facts of the present case clearly bring it within the decision of the Court of Appeal in *Hurst* v. *Picture Theatres, Limited* (1). The agreement of the 1st July is founded on valuable consideration, and the licence which it created was to remain in force for the term of four years.

That this agreement was put an end to and violated by the defendant, by the execution of the lease of the 13th September, is to my mind clear beyond doubt. The execution of this lease was the direct and voluntary act of the defendant, and it was a breach of a contract in the form of an irrevocable licence. It may not be accurate to say that the licence thereby given was revoked. There was no revocation, or recalling of the permission. But though the licence was not in strict terms revoked, it was determined or annulled by the assignment of the subject-matter to which it was attached. "If a man gives a licence, and then parts with the property over which the privilege is to be exercised, the licence is gone": *Coleman* v. *Foster* (2). The licence being determined, the licensee could not justify an entry under the licence, and he is left to his action of damages against the licensor for breach of his contract, the breach being the determination or annulling of the licence which he had granted.

Solicitors for the plaintiffs: *Stewart & Orr.*
Solicitor for the defendant: *John J. MacDonald.*

(1) [1915] 1 K. B. 1. (2) 1 H. & N., at p. 40.

C. L.

K. B. Div. 1915.

BEIRNE, Appellant; DUFFY Respondent (No. 2) (1).

June 3, 11.

Licensing Acts—Licensed Premises—Business other than Sale of Intoxicating Liquors carried on—Billiard-playing—Billiard-room and Bar-room—Back door from each into Common Yard—"Structural Separation"—Intoxicating Liquors (Ireland) Act, 1906 (6 *Edw.* 7, *c.* 39), *s.* 2.

Licensed premises consisted of an hotel, an open yard at the back thereof, and a billiard-room projecting from the rear of the hotel into the yard. The sale of intoxicating liquor was carried on in the bar-room, an apartment immediately adjacent to the billiard-room, and separated from it by a wall of masonry without any opening. From the street the entrance to the yard was by a passage under part of the hotel. The hotel and the billiard-room had each a back door into the yard. To get from the billiard-room to the bar-room one had to step into the yard, and from there to the back door of the hotel, thence through a passage to the hall of the hotel, and thence through another passage to the bar-room, a distance of about 60 feet. During hours when licensed premises are required to be closed, the licensee kept the billiard-room open, but at the same time the back door of the hotel, and the bar-room door, were locked. The licensee was prosecuted for having failed to close her licensed premises as required by statute.

Held, by Palles C.B. and Gibson J., Cherry L.C.J. dissenting, that the portion of the premises in which the sale of intoxicating liquor was carried on was not structurally separated from the billiard-room, and that the defendant had committed a breach of section 2 of the Intoxicating Liquors (Ireland) Act, 1906.

Case stated by justices under 20 & 21 Vict. c. 43.

At Strokestown Petty Sessions, on the 22nd April, 1915, the appellant, a district inspector of the Royal Irish Constabulary, was complainant in a summons which charged the respondent, a hotel proprietress and licensed trader, with the offence of failing to close her licensed premises from 9 p.m. on Saturday, the 27th March, 1915, as required by sect. 2 of the Intoxicating Liquors (Ireland) Act, 1906, and of having kept open the premises for the purpose of carrying on a business other than the sale of

(1) Before Cherry L.C.J., Palles C.B. and Gibson J.

intoxicating drinks, viz., billiard-playing, the portion of the premises in which the sale of intoxicating liquor was carried on not being structurally separated from the remainder of the building. In a second summons she was charged with a similar offence on Good Friday, the 2nd April, 1915.

The facts, as stated in the case, were as follows:—The licensed premises consisted of (*a*) the hotel proper (exclusive of the billiard-room); (*b*) an open yard at the rear of the hotel, with an entrance from the street by a passage under part of the hotel, with gates at the street; (*c*) a billiard-room built projecting from the rear of the hotel into the yard. There was not any internal communication between the billiard-room and the hotel proper.

The sale of intoxicating liquor was carried on in the bar-room, an apartment immediately adjacent to the billiard-room and separated from it by a wall of masonry without any opening. There was a back door from the hotel proper into the yard, near the billiard-room. The door of the billiard-room was in the end farther from the hotel proper. The nearest communication between the billiard-room and the bar-room would be through the door of the billiard-room into the yard, thence to the back door of the hotel proper, thence through a passage to the hall of the hotel, and thence through another passage to the bar-room, a distance of about 60 feet. Part of the first-mentioned passage projected into the billiard-room at one corner, being separated from it by a studded partition in which were a door and a window, both now effectively boarded up on both sides. This projection appeared to have been a porch at one time, before the billiard-room was built.

There were some out-buildings in the yard, one of which was used for storing barrels of beer, and also as a bottling shed. From the store to the billiard-room door was about 8 feet. This store was not used for consumption of liquor, and it was not suggested that drink was sold there.

On Saturday, the 27th March, 1915, an acting-sergeant of the Royal Irish Constabulary at 10 p.m. entered the yard, the gates of which were open, and then went into the billiard-room, the door of which was open. He found in it two men who live in Strokestown. There was no sign of drinking in the billiard-room. He then went to the hotel back door, which was locked; he was

K. B. Div. 1915.

BEIRNE v. DUFFY (No. 2).

admitted after knocking and stating his business; he found the bar-room door also locked. The evidence as to the 2nd April was similar —the hour was 9.30 p.m. Five men were in the billiard-room, four being Strokestown men. On neither date was any employee of the hotel found in the billiard-room. Each of the police witnesses deposed that he had been in the habit of visiting the premises in the discharge of his duty on an average twice a week, and had never found illegal consumption of drink taking place.

The justices were of opinion on the evidence, and they held as a fact, that the separation between the billiard-room and the bar-room was of such a character that no effective order for drink could be given from the billiard-room to, and received at, the bar-room.

There had been at one time a direct communication between the billiard-room and the bar-room by a doorway in the wall separating the two rooms, closed by a door with glass panels. Afterwards iron bars were added, fixed by bolts, which prevented the door being opened from either side. In consequence of the decision of the King's Bench Division in *Beirne* v. *Duffy* (1), the defendant caused the doorway to be boarded up on both sides. Two charges similar to those in this case were then heard at Strokestown Petty Sessions on the 9th October, 1914. That Court thought that the closing by boards only did not comply with the requirements of the statute, and convicted. The defendant then appealed to the Quarter Sessions held at Strokestown on the 16th day of January, 1915, which Court reversed the decision of the Petty Sessions, and dismissed the complaints.

After the decision of the Quarter Sessions the defendant caused the doorway between the billiard-room and the bar-room to be wholly closed up by masonry work flush with the rest of the wall on both sides.

It was contended before the justices, on behalf of the complainant in the present case, that the portion of the licensed premises where intoxicating liquor was sold was not structurally separated from the rest of the building (*a*) by reason of the possibility of communicating from the billiard-room, through the

(1) [1914] 2 I. R. 68.

yard, back door, passage, hall and passage, with the bar-room; (*b*) by reason of the proximity of the billiard-room to the out-house used as a store-room and bottling-shed; and that, therefore, the keeping open of the yard and billiard-room during closing hours was a breach of the statute. Having regard to the decision of the Court of Quarter Sessions, the justices held in the present cases that the hotel proper (being the portion of the premises in which sale of intoxicating liquor was carried on) was structurally separated from the remainder of the building, viz., the billiard-room, and they therefore dismissed the complaints on the merits.

The opinion of the Court was now sought as to whether they were right in law in their determination.

Rearden (with him *the Solicitor-General, James O'Connor K.C.*) for the appellant:—

While there are means of communication within the curtilage between the portion of the building where intoxicating liquor is sold and the remainder of the licensed premises, there is no structural separation. To comply with the requirements of the statute the structural separation must be such "as not to admit of a possible communication between the two businesses": per Kenny J. in *R.* (*Richardson*) v. *Sweeney* (1). A locked door is not a structural separation: *R.* (*Richardson*) v. *Sweeney* (1); nor does a wire net-work constructed on a wooden frame, and fastened with bolts to the walls, constitute such a separation: *Toppin* v. *Coleman* (2).

Fetherstonhaugh K.C. and *Leonard* for the respondent:—

The structural separation between the two businesses is as effective and thorough as if the two sets of premises were actually in the ownership and occupation of two different persons. The distance between the bar-room and the billiard-room is sixty feet, but, in principle, a separation of the character of that in this case, no matter how narrow, would be a sufficient compliance with the statute. According to the Crown, two sets of premises self-contained, abutting on a common yard, cannot be structurally

(1) 42 I. L. T. R. 174, at p. 176. (2) [1910] 2 I. R. 200.

K. B. Div. 1915.

BEIRNE v. DUFFY (No. 2).

separated. The Legislature, however, assumes a structural separation of two portions of the same "building," and the Crown argument goes so far as to ask the Court to legislate. Structural separation must be considered as a physical fact; and the justices have found as a fact that the portion of the premises in which the sale of intoxicating liquor was carried on was structurally separated from the remainder of the building. [They referred to *Brigden* v. *Heighes* (1).]

The *Solicitor-General* in reply :—

If the defendant's argument were adopted, the object with which the statute was passed could be defeated.

Cur. adv. vult.

June 11.

GIBSON J. :—

The question before us is important, and not free from difficulty. The Solicitor-General contends that if the defendant's construction of sect. 2 is adopted, the apparent object of the enactment could be frustrated or evaded with impunity, as lateral or back communication between the two sections of the building or buildings could be kept open. On the other hand, Mr. Fetherstonhaugh urges that his interpretation is warranted by the language used, and that inconvenient results would flow from the rival construction.

The physical facts are not in dispute. The billiard-room, which forms the rear portion of the licensed premises, was originally separated from the public-house proper by a wall, in which there were a door and a window. These have now been permanently closed in compliance with our decision in a previous case, so that internal communication between the two is effectually stopped. Access, however, from the billiard-room to the public-house is still possible by using the back or side doors opening into the yard between, which forms part of the licensed premises.

The drafting of the section is loose. Where the licensed premises are used for ordinary business (which I may call secondary) as well as for the primary purpose of sale of intoxicants, the object of the Legislature is to exclude the possibility of

(1) 1 Q. B. D. 330.

illicit intercourse between the two sections of the premises, which must be structurally separated for that purpose. Parliament had in mind probably such cases as *Tassell* v. *Ovenden* (1), where both portions of the premises were open to the thoroughfare, and would be exposed to police supervision. But the provision applies clearly also where the secondary business, as here, is carried on in the rear of the premises, and it is not disputed that there was business in the billiard-room.

Licensed premises may exhibit different forms of construction. They may consist of two buildings in juxtaposition, or of one building; and the communication between the various portions of the premises may be internal or external. The licensed premises here as constructed are the unit to which sect. 2 applies, and the portion used for the primary business must be structurally separated from the remainder of the building: *Toppin* v. *Coleman* (2). According to Mr. Fetherstonhaugh, structural separation sufficient to block passage or communication inside a building is all that is required. If the building is so divided, he says, the section does not prohibit side or back doors, notwithstanding that such doors may be so close to one another that, with a stride or two outside the flank wall, a customer could pass from one door into the other. If the space was covered over, the doors would be inconsistent with structural separation. If the space between the doors was not roofed, there would be structural separation. When the aperture in the wall dividing the billiard-room from the publichouse was closed that was, in his view, a compliance with the statute; and doors at each side of the dividing wall opening through the exterior wall into the billiard-room and public-house respectively, though only a foot apart, could have been made without violation of the Act, though communication between the two businesses through such doors would have been much easier than through the apertures in the cross dividing-wall, held by this Court in the previous prosecution against the defendant to have been an infringement of the statute. In other words, the protection of a structural separation is only applicable to licensed premises laid out on a particular ground plan. The

(1) 2 Q. B. D. 383. (2) [1910] 2 I. R. 200.

K. B. Div. 1915.

BEIRNE v. DUFFY (No. 2)

Gibson J.

section, however, deals with licensed premises as one whole, and with two businesses going on concurrently therein. Whether access between the primary and secondary part of the premises is through, from front to rear, or at the side or back, the mischief would appear the same in quality if not in degree. The danger of evasion, when the communication was at the rear of the premises and away from the street, might be enhanced.

Reliance may be placed on the expression "remainder of the building." The use of the singular does not help. "Building" here denotes the entire structure, the aggregate of the licensed buildings. Before the billiard-room door and window were blocked, the structure was, to the eye, one building. Further, for a long period the singular in statutes includes the plural. If the expression "licensed premises" comprehends all the licensed premises, however constructed, the word "building" cannot be read as confining the enactment to one kind of licensed premises laid out in a particular way. Such construction would go far to defeat the intention of the legislation, which is to put a physical barrier between the two businesses which may be conducted in any part of the licensed premises. Instances were put where it was suggested that hardship and inconvenience might result from my construction. Several of the examples would not be within the enactment at all, and I do not discuss them. This case relates to a billiard-room, part of the licensed premises, immediately behind the public-house portion; it is a useful adjunct to the primary business; and effective exclusion of access by side or back doors as well as internal passage is required. The yard here was part of the licensed premises. Even if it was not, this might possibly not make a difference, the premises being in one occupation and constituting one integer and the buildings all being included in the licence. They form one block.

The argument that the expression "remainder of the building" implies that the premises used for the secondary business must be buildings and nothing else, may represent what the Legislature may have immediately contemplated, but "licensed premises" must mean all the licensed premises of whatever character.

Mr. Leonard's additional contention that structural separation

was a question of fact on which the decision of the justices was final, might be valid if the evidence left this matter uncertain; but where the facts are conclusively ascertained, the question is one of law, as *Toppin* v. *Coleman* (1) decides. He relied on the distance separating the two doors. But Mr. Fetherstonhaugh's proposition is, that whether the distance was one foot or sixty would make in the circumstances no difference. Possibly distance and degree may affect the question, but I accept Mr. Fetherstonhaugh's view in relation to the present facts.

Mrs. Duffy is an innocent offender, if there has been a violation of the law, and has acted in a straightforward manner throughout. There is no suggestion that the billiard-room has ever been used illegitimately, and she honestly did what was thought necessary to ensure complete structural separation. Though we might reverse the decision below, there should be no costs.

PALLES C.B.:—

I agree with my brother Gibson.

Under the 6th Edw. 7, c. 39, sect. 2, to render it legal to have the billiard-room, which was part of the licensed premises, open at the time in question, it was necessary that the portion of the licensed premises in which the sale of intoxicating liquors was usually carried on should be structurally separated from the rest of the buildings. I purposely use the word "buildings" in the plural—although in the section it is in the singular—because when two buildings are included in the one licence, "building" in the section must be read in the plural, and therefore it is unnecessary to consider whether the buildings here are one only or two.

Thus, a given space is to be structurally divided into two separate parts. It is clear that this division must be complete. If there be a gap in the dividing line, in which gap the division is not structural, the statute will not be satisfied, because where the gap occurs there is no structural separation between the two parts; therefore, it seems to me that Mr. Rearden's contention is correct that if there be any *internal* communication between the billiard-room and the part of the premises containing the bar, the statute

(1) [1910] 2 I. R. 200.

K. B. Div. 1915.

BEIRNE v. DUFFY (No. 2)

Palles C.B.

is not complied with. By internal communication I mean communication within the licensed premises as here. It is specially found that the yard and the billiard-room are each part of the licensed premises. It is different when the communication is external, as in such a case the gap is not in the line separating the two parts.

In the present case the dividing line passes through the yard, and in it there are two gaps where there is no structural separation, viz., the door between the billiard-room and the yard, and the door between the yard and the other part of the premises, *i.e.*, that containing the bar. These two gaps are internal, *i.e.*, within the licensed premises. This is founded on the grammatical construction of the section, and it carries out the object of the section. The evidence, therefore, proved the charge.

In my opinion there should be no costs.

CHERRY L.C.J. :—

In this case I regret to say that I cannot concur with the other members of the Court. But, however much I may distrust the soundness of my own views, having regard to the judgments which have just been given, I feel bound to state briefly my reasons for differing from them. The defendant, who is a licensed hotel proprietor, is charged with the offence of failing to close her licensed premises at a time required by law, viz., after 9 p.m. on Saturday evening. Her defence is that the portion of the premises in which the sale of intoxicating liquors is carried on is "structurally separated from the remainder of the building" within the meaning of the 2nd section of the Intoxicating Liquors (Ireland) Act, 1906, under which the prosecution is brought, and that it was the latter portion only of the premises which was kept open after the legal closing time.

The case states that the licensed premises consist of—(*a*) the hotel proper, (*b*) an open yard at the rear of the hotel, and (*c*) a billiard-room built projecting from the rear of the hotel into the yard. The sale of intoxicating liquors is carried on in the bar-room immediately adjacent to the billiard-room. Formerly there were both a door and a window between the bar and the billiard-

room, so that it could not be contended that there was any structural separation between them. The defendant then, with a view to keeping open the billiard-room for play after closing time for the bar, closed the door by iron bolts, but allowed the window to remain in its original position. She was then summoned for allowing the billiard-room to remain open after closing hours, and the case came before this Court on a case stated, when it was held that, inasmuch as an order for drink could be communicated through the window from the billiard-room to the bar, there was not a "structural separation" between them within the meaning of the Act. The case is reported (1), and it appears to have been assumed, both in the arguments and in the judgments, that but for the existence of this door and window, and the possibility of communicating through them, there would have been such a structural separation, and no offence would have been committed by keeping open the billiard-room after closing hours in the bar.

Acting on this assumption, the defendant has permanently closed up both door and window, by a solid masonry wall. It is admitted that no order for drink could now be communicated through this wall, and the justices have found as a fact that there is not now any internal communication between the billiard-room and the hotel proper. To get from the bar to the billiard-room one has to pass through the hall of the hotel, out through the back door into the open yard, round the billiard-room, and into it through a door at the far end from the hotel—a more effectual structural separation as a physical fact I am unable to conceive. Furthermore, the justices have expressly found as a fact that the hotel proper (being the portion of the premises in which the sale of liquor is carried on) is structurally separated from the remainder of the building, viz., the billiard-room. This, to my mind, is a question of fact as to which the finding of the magistrates is conclusive, and we ought, I think, therefore, to affirm their order dismissing the summonses.

The prosecutor however contends, as a matter of law, that if it be possible to get from one portion of the building to the other without leaving the demised premises, there can be, in

(1) [1914] 2 I. R. 68.

K. B. Div. 1915.

BEIRNE v. DUFFY (No. 2).

Cherry L.C.J.

law, no structural separation between them; and that, therefore, in the present case, inasmuch as the yard is in the defendant's possession, and included in the licence, there is no structural separation.

It would have been, in my opinion, fairer to the defendant if this point had been raised when the case was formerly before the Court, instead of being kept in reserve. It is rather hard on her that she has been allowed to incur considerable expense in complying with what she supposed to be the requirements of the law, and now finds herself no better off than she was before. However, the prosecutor is within his rights in acting as he has done, and we must decide the point. It appears to me that there are several answers to the argument.

In the first place, I think that a question of "structural separation" must, by its very nature, depend upon physical facts and not upon legal ownership. It is admitted that if this yard were not in the defendant's possession, or included within the licensed premises, there would be a structural separation; but it is said that because there is this unity of ownership there can be no such separation. This contention leads to the startling result that buildings absolutely detached from each other, and separated, it may be, by a large tract of land, would not be structurally separated from each other, within the meaning of the section, if they were both included in one licence.

Again, the section of the Act we are called upon to construe refers to the portion of the premises in which the sale of intoxicating liquor is carried on as being "structurally separated from the remainder *of the building*," not from the remainder of the demised premises, or the remainder of the licensed premises; showing, as one would naturally expect, that upon a question of structure, the Legislature was referring to buildings, and not to lands upon which there were no buildings.

The word "building," too, in the section is in the singular, not in the plural. There must be one building for any question to arise; and the true test of structural separation is, in my opinion, "Is there or is there not any internal communication between the different parts of the building?" By "internal" I mean,

"without going outside of the building." If there is, there is no structural separation. If there is not, as now in the present case, the two parts of the building are in my opinion structurally separated.

Solicitor for the appellant: *Sir Malachy Kelly*, Chief Crown Solicitor.

Solicitor for the respondent: *T. J. Gaynor.*

C. L.

K. B. Div. 1915.

June 3, 4.

O'CALLAGHAN, Appellant; IRISH INSURANCE COMMISSIONERS, Respondents (1).

National Insurance—School Attendance Inspector—Employment under Local Authority—"Contract of Service"—"Employed Contributor"—Irish Education Act, 1892 (55 & 56 *Vict. c.* 42), *s.* 3—*National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 1, *sub-s.* 1, 2; *Sched.* 1, *Part* 1 (*a*)—*National Insurance Act*, 1913 (3 & 4 *Geo.* 5, *c.* 37), *s.* 6.

A person appointed as school attendance inspector by a school attendance committee under the provisions of the Irish Education Act, 1892, is an "employed contributor" within the meaning of the National Insurance Acts, 1911 to 1913, and the committee is liable for the payment of the contributions in respect of him.

Case Stated by justices under 20 & 21 Vict. c. 43. The case stated set out as follows:—

At the Fermoy petty sessions, held on the 8th February, 1915, the complainants, the Irish Insurance Commissioners, charged the appellant and others, as defendants, that they, being the employers of one Thomas Meares, an employed contributor within the meaning of the National Insurance Acts, 1911 to 1913, did on the 4th July, 1914, fail to pay a contribution of four pence which under the said Acts and the regulations made thereunder they were liable to pay in respect of the said Thomas Meares for the week commencing the 29th June, 1914.

The facts as proved or admitted were as follows:—The defendants were the school attendance committee of Fermoy urban district, and were duly appointed under the provisions of the Irish Education Act, 1892, five being nominated by the Fermoy Urban Council, and five by the Commissioners of National Education for Ireland. About eight years ago Thomas Meares was appointed by resolution of the then existing school attendance committee,

(1) Before Cherry L.C.J., Palles C.B., and Gibson J.

under section 3, sub-sect. 3, of the Irish Education Act, 1892, to perform the duties of school attendance inspector; he still continued to perform such duties, and received as remuneration therefor the yearly sum of £25, paid to him quarterly out of the rates, the amount of this remuneration having been fixed by the committee with the approval of the local authority. Thomas Meares, being a pensioner, had applied for and obtained a certificate of exemption under Part I of the National Insurance Act, 1911. The defendants had no funds at their disposal. The expenses of the defendants and the salaries and expenses of their officers were defrayed by the urban district council out of the local rates. The defendants had not paid any contribution under the National Insurance Acts in respect of Meares.

The complainants contended that the defendants, as such school attendance committee, were the employers of Meares within the meaning of said Acts, and liable to pay the contribution; and they relied on the Irish Education Act, 1892, section 3, sub-sect. 3, and the National Insurance Act, 1911, Schedule 1, part 1 (*a*).

The defendants contended that no contract of service existed between them and Meares, and they relied on the case, *Re Employment of Poor Law Officers* (1), and on section 3, sub-sects. 1 to 5, inclusive, of the Irish Education Act, 1892.

By a majority the justices decided in favour of the complainants, and convicted the defendants and imposed a fine of one penny and costs. For convenience, and by arrangement between the complainants and defendants, the fine was imposed upon the Rev. Maurice M. O'Callaghan only, he being the chairman of the school attendance committee; and the charge against the other defendants was withdrawn.

The justices stated the present case, seeking the opinion of the Court as to whether they were right in law in convicting the defendant.

(1) 47 I. L. T. R. 28. Reported [1913] 1 I. R. 244, *sub nom. In re National Insurance Act*, 1911 (*Officers of South Dublin Union*).

K. B. Div. 1915.

O'Callaghan v. Irish Insurance Commrs.

H. J. Moloney for the appellant:—

There is no contract of service between the school attendance committee and the inspector. Under the Irish Education Act, 1892 (55 & 56 Vict. c. 42), section 3, sub-sect. 3, the committee is empowered to "appoint" officers; but it is not given power to enter into contracts of any kind. When a statute means to speak of contracts, it speaks of them by that name: *Bogg* v. *Pearse* (1), per Maule J., at p. 542. The word "employment" connotes a contract; but here the inspector is merely a statutory official carrying out a statutory duty. Although the Irish Education Act authorizes the school attendance committees to appoint officers, and fix their remuneration, it does not say that they shall pay it; on the contrary, it provides that it shall be paid out of the local rate. Officers of a poor law union are not employed under a contract of service with the guardians within the meaning of Part I of the First Schedule of the National Insurance Act, 1911: *In re National Insurance Act*, 1911 (*Officers of South Dublin Union*) (2); and notwithstanding section 6 of the National Insurance Act, 1913, that decision governs this case.

R. J. Sheehy, and *the Solicitor-General* (*James O'Connor K.C.*), for the respondents:—

The words "under any contract of service" in the First Schedule, Part I (*a*) of the National Insurance Act, 1911, must be given a wide meaning. An officer in the position of a school attendance inspector, whose duties are prescribed by the committee, is clearly employed by that committee under a contract of service.

This case is not affected by the decision in *In re National Insurance Act*, 1911 (*Officers of South Dublin Union*) (2). Even if the employment here came within the terms of that decision, the addition to Part I of the First Schedule of the principal Act, made by section 6 of the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), would include school attendance inspectors, and bring them within the category of employed contributors.

Moloney in reply.

(1) 10 C. B. 534. (2) [1913] 1 I. R. 244.

CHERRY L.C.J.:—

This is an extremely important case; but inasmuch as each member of the Court has formed a clear and definite opinion upon it, it is not necessary to reserve judgment. The questions are, first, whether a school attendance inspector appointed under the provisions of the Irish Education Act, 1892, is an "employed contributor" within the meaning of the National Insurance Acts, 1911 to 1913; and, secondly, if so, who is liable for payment of the contributions.

The school attendance committee is created by virtue of section 3 of the Irish Education Act, 1892. Sub-section 1 of that section enacts that "In every place to which this section applies there shall be a school attendance committee consisting of six, eight, or ten persons, as the local authority of the place may determine, one half of whom shall be appointed by the local authority and the remainder by the commissioners, and not less than one-half of whom shall, where such persons are available, be managers or patrons of schools in the place; and the local authority shall make regulations, subject to the approval of the commissioners, as to the time and mode of appointment of the committee and the conduct of their proceedings." Sub-section 3 is an important one. It provides that "The school attendance committee may appoint and remove officers and prescribe their duties, and, with the approval of the local authority, fix their remuneration." Sub-section 5 is also important. It states that—"The expenses of a school attendance committee, and the salaries and expenses of their officers, shall be defrayed by the local authority out of the local rate, but any revenue from penalties under this Act in the place or district shall be applied in relief of the local rate."

The school attendance committee may appoint and remove an inspector, prescribe his duties, and fix his remuneration. I cannot conceive how any person appointed under these powers can be regarded as other than a servant of the committee under a contract of service. It is immaterial whether his salary is paid by the school attendance committee or the local authority. All the elements which are necessary to constitute a contract of service are present, and the school attendance inspector is, in my opinion,

K. B. Div. 1915.

O'CALLAGHAN v. IRISH INSURANCE COMMRS.

Cherry L.C.J.

clearly an "employed contributor" within the meaning of the National Insurance Act, 1911.

If there were any doubt about the matter, it would be set at rest by the amending Insurance Act of 1913 (3 & 4 Geo. 5, c. 37. Section 6 of the latter Act provides that—"There shall be added to Part I of the First Schedule to the principal Act which specifies the classes of employment which is employment within Part I of the principal Act, the following paragraph:—(*e*) Employment under any local or other public authority except such as may be excluded by a special order." That means employment under a local authority where otherwise there is no contract of service, so that, even if there were no contract of service in this case, the school attendance inspector would come in under section 6 of the Act of 1913.

In the *South Dublin Union Case* (1) the Master of the Rolls decided that officers of a Poor Law Union are not employed under a contract of service with the guardians within the meaning of Part I of the First Schedule of the National Insurance Act, 1911. But the powers of control by the guardians of workhouse officials under the Poor Law Acts are much more limited than those of a school attendance committee over their inspector under the Education Act, 1892, so that that decision is not an authority against the view we are taking in this case. Even if it were, the passing of the Amending Act of 1913 completely alters the situation. The 6th section of the latter Act can have no meaning unless it applies to the present case.

The result is that the inspector under the Education Act is an "employed contributor" within the meaning of the National Insurance Acts, and the school attendance committee is liable for the payment of the contributions in his case.

PALLES C.B. and GIBSON J. concurred.

Solicitor for the appellant: *J. E. Troy.*
Solicitor for the respondents: *H. Horan.*

C. L.

(1) [1913] 1 I. R. 244.

LYNCH, APPELLANT; O'REGAN, RESPONDENT (1).

K. B. Div. 1915. June 4, 9.

Local Government—County Council—Committee—County Councillor—Disqualification—Paid office under the Council—Local Pension Committee—Clerk of Committee—Local Government (Application of Enactments) Order, 1898, *Art.* 12 (4) (*d*), (6), (11)—*Old Age Pensions Act*, 1908 (8 *Edw.* 7, *c.* 40), *s.* 8—*Old Age Pensions Regulations*, 1911, *Arts.* 21 *and* 23.

A local pension committee, appointed by a county council under the provisions of the Old Age Pensions Act, 1908, and the regulations made thereunder, is a committee of the council within article 12 (6) of the Local Government (Application of Enactments) Order, 1898, and a member of the council holding the position of paid clerk of the committee is disqualified under article 12 (4) (*d*) of the Order for being a member of the council.

The question what is a committee of a council within the meaning of article 12 (6) of the Local Government (Application of Enactments) Order, 1898, considered.

CASE STATED by justices under 20 & 21 Vict. c. 43.

At a petty sessions held at Ennis on the 7th May, 1915, the appellant, a solicitor practising in Ennis, was complainant in a summons in which the defendant (the respondent herein) was charged with the offence of having acted on the 7th December, 1914, as a member of the Clare County Council, he being at the time "disqualified for being a member of the said county council by reason of holding a paid office or place of profit under or in the gift or disposal of a committee of the said county council or of a joint committee appointed by the said council, to wit, clerk of Clare county committee under the Old Age Pensions Acts, 1908 and 1911."

It appeared from the case stated that the justices found the facts proved as follows:—

That the defendant had been a member of the Clare County Council since before the 19th August, 1908, and had been since June, 1914, chairman of same; that he acted as such chairman

(1) Before CHERRY L.C.J., PALLES C.B. and GIBSON J.

K. B. Div 1915.

LYNCH v. O'REGAN.

and voted at the meeting of the council on the 7th December, 1914; that the council appointed a committee for the county Clare, pursuant to the Old Age Pensions Act, 1908, and the regulations made thereunder, on the 19th August, 1908; that such committee was in existence and acting during the year 1914; that the defendant was appointed the clerk of that committee on the 31st August, 1908; that he was such clerk and acted as such during 1914; that the appointments of both the pension committee and the defendant as their clerk were recognized by the Treasury, and that fees and expenses had been paid to the defendant under the scale laid down by the Treasury regulations of the 1st April, 1910, continuously from January, 1910, till February, 1915.

The case continued: "Had we decided that the said pension committee should be regarded as a committee of the county council, we would have held that the defendant had incurred the penalty under said Article 12 of the Application of Enactments Order, 1898.

"But we were of opinion that to hold said pension committee a committee of the council would be to go beyond any of the decisions cited before us. In all these cases the funds of the committees had been provided by the respective councils appointing them, whereas in the present case not a penny is supplied by the council. We thought that this circumstance strongly distinguished the present case from *Keeffe* v. *Shaughnessy* (1), where the county council had power to raise a rate for the purposes of the agricultural committee. Another difference is that the latter was delegated to do work cast upon the county council, whereas no duties whatever (except the naming of the committee) are cast upon the council by the Old Age Pension Act. Another difference is that the defendant in this case is not a member of the committee, and there could not be any conflict between his interest and duty except on the occasion of the election of the committee by the county council. A further distinction is that the council may appoint a pension committee from persons totally outside the council.

"For these reasons we did not think we were coerced by

(1) [1915] 2 I. R. 105.

Keeffe v. *Shaughnessy* (1) to convict, and as we had considerable doubt as to whether a body so independent of the county council as the pension committee could be held a committee of it, we felt bound to give to the defendant the benefit of the doubt, and four of our number decided to dismiss the charge on the merits. The fifth member of the Court, Mr. P. J. Kelly, R.M., while agreeing as to the facts set forth, dissented from this view, on the ground that as the pension committee must be a committee of some other body, and as by the Treasury Regulations, 1908-1911, sec. 21 (2), (3) (*b*) (*d*), and (4), power is given to the council to make regulations for the committee's proceedings, also to fill vacancies and remove members, and the council was thus given control to some degree over the committee, the latter is in his opinion a committee of the county council, and the defendant should be convicted.

"And the opinion of the Court is sought as to whether we were right in law in dismissing said complaint."

J. M. Fitzgerald (with him *Serjeant Sullivan K.C.*), for the appellant :—

A person holding any paid office or place of profit under or in the gift or disposal of a county council, is disqualified for being a member of the council: Local Government (Application of Enactments) Order, 1898, Article 12 (4) (*d*). By sub-section 6 of the same Article, any committee of a council is to be treated as if it were the council.

The net question in this case is whether the local pension committee is a committee of the council, and, if so, whether the fact that the funds for the payment of the salary of the clerk of the committee are levied from Imperial, and not from local or county sources, distinguishes the case from *Keeffe* v. *Shaughnessy* (1).

A committee is "a body of two or more persons, appointed or elected by a society, corporation, public meeting, &c., for some special business or function": New English Dictionary. Local pension committees are appointed under section 8 of the Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), and the persons appointed

(1) [1915] 2 I. R. 105.

K. B. Div. 1915. LYNCH v. O'REGAN.

on these committees need not be members of the council by which they are appointed. The Old Age Pensions Regulations of the 17th August, 1911, provide by Article 21 for the constitution of the local pension committees. Subject to certain limits, the number of members is determined by the appointing council; the council may make regulations as to the quorum, proceedings, &c.: sub-s. 2; and it may at any time remove a member: sub-s. 2 (*d*). Every local pension committee shall appoint some fit person to be clerk of the committee "to hold office during the pleasure of the committee": Article 23 (1); and the committee may assign to the clerk such remuneration, within a fixed scale, as they think fit; Art. 23 (2). The local pension committee is as much controlled by the council as the agricultural committee was in the case of *Keeffe* v. *Shaughnessy* (1), and a member of the council holding a paid office under the local pension committee is as much within the mischief intended to be remedied as a member of a council or agricultural committee who has been awarded a premium under a cattle-breeding scheme. It is really immaterial from what source the funds come, once a member of a council is found holding a paid office under the council. [He referred to *Crump* v. *Lewis* (2) and *Greville-Smith* v. *Tomlin* (3).]

Phelps, and *Henry K.C.*, for the respondent:—

The local pension committee is not a committee of the council. Under section 8 of the Old Age Pensions Act a committee *for* the county is appointed by the council, and, according to sub-sect. 3 of that section, the central pension authority is the Local Government Board, upon whom, in conjunction with the Treasury, primarily devolves the duty of administering the Act. The duties of the central authority are delegated to the local pension committee, and the latter, if it is a committee of any larger body, must be regarded as a committee of the Local Government Board. The Article under which the prosecution has been brought is part of the Local Government code, but an old age pension committee

(1) [1915] 2 I. R. 105.
(2) [1908] 1 K. B. 858.
(3) [1911] 2 K. B. 9.

is no part of that code; no duties are delegated by the county council to the local pension committee.

Section 10 (sub-s. 1) of the Old Age Pensions Act provides that the Treasury, in conjunction with the Local Government Board and with the Postmaster-General, may make regulations for carrying the Act into effect. All the funds for the payment of pensions and expenses are supplied by the Treasury, and not a penny for these purposes is raised locally. The local pension committee alone has the power to appoint a clerk of the committee: Old Age Pensions Regulations, 1911, Art. 23, sub-s. 1; and within one month after the end of each quarter the clerk of the committee has to render to the Accountant and Controller-General of Customs and Excise, in the prescribed form, accounts showing the amounts due to himself and to the clerks of the respective sub-committees (if any) in respect of the expired quarter; and the Accountant and Controller-General will, after examination of the accounts, pay the balance due to the clerk: Financial Instructions for Pension Committees and Sub-Committees, 1910, Article 13. Therefore, the Crown becomes liable for the payment of the clerk's remuneration.

The prosecutor here seeks to extend the principle of *Keeffe* v. *Shaughnessy* (1). In that case there was a delegation by the county council of its power to a committee which was appointed to administer a local scheme financed partly out of funds provided by the local rates. In *The Queen* v. *Rawlins* (2) the clerk of a Highway Board, whose salary was paid out of a fund raised under a poor-rate, was held not to be incapable of acting as a guardian, on the ground that when the fund passed into the hands of the Highway Board it was no longer poor-rate. The local pension committee is an independent body whose acts, unlike those of committees appointed under Article 36, sub-s. 4 of the Application of Enactments Order, do not require to be confirmed by the council. There is no virtue in the expression "committee." This body might have been called "the local pension board," or "the local pension authority," and if it had been so described, the case for the prosecutor would have been unarguable.

(1) [1915] 2 I. R. 105. (2) 15 Q. B. D. 382.

K. B. Div. 1915. LYNCH v. O'REGAN.

Serjeant Sullivan K.C., in reply :—

Section 1 of the Local Government (Ireland) Act, 1898, provides that a council shall be established in every administrative county, and be entrusted "with the management of the administrative and financial business of the county." Although the funds for the payment of pensions and expenses under the Old Age Pensions Act are provided by the Imperial Exchequer, the Act is administered in counties by committees appointed by the county councils, and the powers and duties entrusted to the councils, acting through these committees, relate to "the administrative and financial business of the county."

A committee cannot be regarded as an independent body. The expression "committee" implies the existence of a parent body. The only body satisfying the description of parent body in this case is the county council.

Cur. adv. vult.

June 9.

CHERRY L.C.J. :—

This is a case stated by justices sitting at petty sessions at Ennis in the County of Clare, and it raises some rather important questions as to the disqualification of members of county councils to hold offices under committees of the councils.

The defendant, who has been for some time a member of the Clare County Council, and is at present chairman of that body, is charged with the offence that he acted as a member of the council at a time when he was disqualified from being a member by reason of his holding a paid office or place of profit under one of the committees appointed by the council. There is no dispute as to the material facts. I say "material" advisedly, because there were some matters discussed to which considerable importance was attached in the arguments, but which in my opinion do not affect the case at all. One was the actual composition of the committee—whether it was composed solely of members of the council, or whether, in addition to such members, outsiders were included. Another matter much discussed was what took place at certain meetings of the committee and council; and we were asked to send the case back to the magistrates for fuller information on these points. I do not think that it is necessary to adopt

this course, as no fresh information on these questions could alter the opinion we have formed on the material facts of the case. These facts are simply that the defendant, a member of the council and chairman of that body, acted as member at a time when he was also clerk of the local pension committee, and was in receipt of fees for discharging the duties of this office. The only material question in the case, as it appears to me, is whether the local pension committee is a committee of the council within the meaning of the Local Government Act, 1898, and the orders in council made thereunder. That depends upon the construction of the Local Government (Application of Enactments) Order, 1898, the Old Age Pensions Act, 1908, and the Regulations made by the Treasury under that Act.

Article 12 of the Application of Enactments Order of the 22nd December, 1898, sub-s. 4, provides that a person shall be disqualified for being elected or chosen or being a member of a council of a county or of a district or of a board of guardians or of any town commissioners, if he holds any paid office or place of profit under or in the gift or disposal of the council, board, or commissioners, as the case may be, other than that of mayor or sheriff. Sub-s. 6 of the same Article provides that:—"The foregoing provisions of this article shall apply as if any committee of a council, board, or commissioners, or any joint committee partly appointed by a council, board, or commissioners, were that council, board, or commissioners." The important words in that sub-section are the words "any committee"; and the question we have to determine is whether this pension committee is a committee of the county council. Sub-s. 11 of Article 12 provides that:—"If any person acts when disqualified or votes when prohibited under this order, he shall for each offence be liable on summary conviction to a fine not exceeding £20, without prejudice to the disqualification enacted by sub-s. 3 of sect. 94 of the Act." The only other article of this order I need refer to is Article 36, sub-s. 4, which provides that:—"Every such council may from time to time appoint, out of their own body, such and so many committees, either of a general or special nature, and consisting of such number of persons, as they think fit, for any purpose which, in the opinion of the council, would be better regulated and

K. B. Div. 1915.

LYNCH v. O'REGAN.

Cherry L.C.J.

managed by means of such committees; but the acts of every such committee shall be submitted to the council for their approval." There are, therefore, two distinct classes of committees. There are, in the first place, the committees which the council themselves form out of their own body under Article 36, sub.-s. 4, for such purposes as they may deem fit; and there are also other committees which are created under various statutes such as the Old Age Pensions Act, the Agriculture and Technical Instruction (Ireland) Act; and, in England, the Unemployed Workmen Act. The broad question which we have to consider is whether the disqualification resulting from being a paid officer extends to the second class, or statutory committees, as well as to those appointed by the councils under the power conferred by Article 36. We have to determine that question with reference particularly to the Old Age Pensions Act, 1908.

Under sect. 7 of the Old Age Pensions Act all claims for pensions are, in the first instance, referred to "the local pension committee" for determination, so as to provide for the local administration of the Act. Section 8, sub-sect. 1, says:—"The local pension committee shall be a committee appointed for every borough and urban district having a population according to the last published census for the time being of twenty thousand or over, and for every county (excluding the area of any such borough or district) by the council of the borough, district, or county. The persons appointed to be members of a local pension committee need not be members of the council by which they are appointed." Sub-sections 2 and 3, although important, do not touch the question we have to determine.

Mr. Henry argues that this section only gives power to appoint a committee, and that, once appointed, the committee is independent of the council. He says that if the word "committee" had not been used in the section, the prosecutor could have made no case. The answer to that argument is plain. This body might have been described as a board or council, but, as a matter of fact, it is described as a "committee"; and the very name "committee" implies the existence of a parent body. The framers of the Act used the word "committee" because they intended the body to be a committee. What body can be the

parent body in this case but the county council? It is true that the persons appointed to be members of a local pension committee need not be members of the council by which they are appointed. But the existence of this provision in the sub-section is itself a very strong argument in favour of the prosecutor's view, for it refers obviously to Article 36, sub-sect. 4, and it would be unnecessary and unmeaning if the pension committee were not a committee of the county council.

Moreover, the powers of county councils are not confined to the mere appointment of the pension committees; they have other and more extensive powers under the Regulations of the Treasury. They can dismiss the members of the committee, and appoint others in their place. Again, Article 21 of the Old Age Pensions Regulations provides that "a local pension committee shall consist of such number of persons, not being less than seven or more than the number of the council by whom the committee is appointed, as the council may determine." So that the council not only appoints the committee, but determines the number of its members. Again, sub-sect. 2 of Article 21 provides that "the council by whom a committee is appointed may make regulations as to the quorum, proceedings, and place of meeting of the committee; but, subject to any such regulations, the quorum, proceedings, and place of meeting of the committee shall be such as the committee determine." The council have, therefore, power to take into their own hands the regulation of the proceedings of the committee. They fix, within certain limits, the period for which members of the committee shall hold office. Sub-section 3 says:—"The term of office of a person appointed to be a member of a committee shall be three years, or such less term as may be fixed by the appointing council at the time of the appointment." Then comes an important proviso:—"(*a*) if any person so appointed is a member of the appointing council, he shall cease to be a member of the committee if he ceases to be a member of that council." If the committee was an absolutely independent body, there would be no reason why a person who ceased to be a member of the council should also cease to be a member of the committee. This proviso is inconsistent with the view that the committee is not a committee of the council. Regulation 21 (3) (*d*) says:—

K. B. Div. 1915. LYNCH v. O'REGAN. Cherry L.C.J.

"The appointing council may, if they think fit, at any time, remove any member of a committee, and appoint another person to be a member of the committee in his place." All these extensive powers, exercised by the council over the committee, establish clearly that the local pension committee is in reality a committee of the council and not an independent body.

These facts as to the formation of the committee and its powers having been brought to the notice of the magistrates, we naturally ask why they did not convict? Substantially their reasons for refusing to do so are the same as those urged before us so powerfully by Mr. Phelps and Mr. Henry. They state in paragraph 5 of the case:—"But we were of opinion that to hold said pension committee a committee of the council would be to go beyond any of the decisions cited before us. In all these cases the funds of the committee had been provided by the respective councils appointing them, whereas in the present case not a penny is supplied by the council. We thought that this circumstance strongly distinguished the present case from *Keeffe* v. *Shaughnessy* (1), where the county council had power to raise a rate for the purposes of the agricultural committee. Another difference is that the latter was delegated to do work cast on the county council, whereas no duties whatever (except the naming of the committee) are cast upon the council by the Old Age Pensions Act. Another difference is that the defendant in this case is not a member of the committee, and there could not be any conflict between his interest and duty except on the occasion of the election of the committee by the county council. For these reasons we did not think we were coerced by *Keeffe* v. *Shaughnessy* (1) to convict, and as we had considerable doubt as to whether a body so independent of the county council as the pension committee could be held a committee of it, we felt bound to give to the defendant the benefit of the doubt."

Comparing the case of *Keeffe* v. *Shaughnessy* (1) with the present case, it is quite true that there are these points of difference between them; but, on reading the former case carefully, I cannot see that in it any special reliance was placed upon

(1) [1915] 2 I. R. 105.

them in determining the decision of the Court. I think the judgment of Palles C.B. in that case is based upon much broader grounds, and that what he decided was that the mischief for which it was intended to supply a remedy was the same in regard to these statutory committees as it was in the case of the committees appointed by county councils under the general powers conferred upon them by the Local Government Act, and that therefore the remedy should be the same. The case of *Keeffe* v. *Shaughnessy* (1) arose under the Agriculture and Technical Instruction (Ireland) Act, 1899; and it was held that a committee consisting of the whole council and certain other persons was a committee of the council. Having referred to Article 12 (6) of the Local Government (Application of Enactments) Order, 1898, Palles C.B. says at page 111:—"The sole question in the case therefore appears to be whether the committee appointed under the Act by the county council was a committee within this sub-article 6." That is the question we have to determine here in reference to another statutory committee. Continuing he says:—"Now, first, it seems clear that the expression 'committee,' in Article 12 (6), was not confined to then existing committees, but might include a committee thereafter appointed, and appointed under a new statutable authority. The order establishes a rule of procedure applicable in perpetuity to county councils, who were capable of obtaining new powers from Parliament, and prima facie this procedure would apply to the proceedings under such new powers so far as the words of the order on their fair construction were applicable thereto. We have thus to determine whether the effect of these two distinctions, relied on by Mr. Henry, or of either of them, is to prevent the statutable committee answering the description of 'committee' (which, I think, means 'committee of the council') in Article 12." Then comes this passage, to which I direct attention as showing that the judgment was based on broad general grounds:—"In approaching this, the first matter to be considered is the mischief for which this Article 12 was intended to supply a remedy. To use the words of Lord Lindley in *Nutton* v. *Wilson* (2)

(1) [1915] 2 I. R. 105. (2) 22 Q. B. D. 744, at p. 748.

K. B. Div. 1915.

LYNCH v. O'REGAN.

Cherry L.C.J.

in reference to a similar provision in the English Local Government legislation: 'The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise.' Now, the statutable committee is plainly within this mischief. There would be the same conflict between interest and duty in the respondent voting on a question whether he himself or an outsider should be chosen as a person who was to undertake to keep a pure-bred bull for the season, so as to obtain a premium, as there would be on a question whether he or another should obtain the contract for a specified work of the council. Next, the committee, although not styled in the Act as committee of the council, is appointed by them, and acts as the delegate of the council." That is the *ratio decidendi* of *Keeffe* v *Shaughnessy* (1), and it applies with full force to the case now before us.

At the end of his judgment Palles C.B. says: "To my mind it is of the utmost importance that the principle that a member of a county council shall not make, or be under the suspicion of making, money out of his office, should be given full effect to, and that legislation for the purpose of enforcing it should not be frittered away by unsubstantial objections, provided the circumstances plainly bring the case, as they do here, within the mischief intended to be remedied. I hold that I am entitled to construe Article 12 (6), so as to enhance the remedy and suppress the mischief, and I am accordingly of opinion that the committee is a committee within Article 12 (6)." It, therefore, appears to me that *Keeffe* v. *Shaughnessy* (1) is direct authority for holding that the committee under the Old Age Pensions Act is a committee of the county council.

The conclusion at which I have arrived is that, as a general rule, committees appointed by county councils under particular statutes to discharge duties under those Acts, are committees of the council within the meaning of Article 12 (6) of the Local Government (Application of Enactments) Order, 1898; and that the same disability arises as regards the holding by members of the council of paid offices or places of profit under them, as in the case of committees appointed under the general powers of the county councils under Article 36 (4) of the Order.

(1) [1915] 2 I. R. 105.

I, therefore, hold that the decision of the magistrates was wrong, and that the case should be sent back to them with a direction to proceed according to law to hear and determine the case, having regard to our decision that the committal of the offence charged was proved by the evidence.

PALLES C.B.:—

I am of the same opinion, and for the same reasons; but as an attempt has been made to rely upon small circumstances as differentiating this case from *Keeffe* v. *Shaughnessy* (1), I desire to say a few words. The defendant is chairman of the county council; the council have the power, and the obligation, to appoint a local pension committee, and they have also the power to dismiss that committee upon a moment's notice, without any cause assigned. Such a committee is not only the creature of the council, but is under their absolute control. The chairman of that council, who necessarily exercises a great deal of authority over its members, has been appointed clerk to a committee which is the creature of the council. What we have to determine is whether that appointment is valid, having regard to the provisions of Article 12 of the Local Government (Application of Enactments) Order, 1898, referred to by the Lord Chief Justice.

I wish to do a little more than I thought it necessary to do in *Keeffe* v. *Shaughnessy* (1). I wish to place this case—as the Chief Justice has placed it—upon as broad a ground as possible. It differs from *Keeffe* v. *Shaughnessy* (1) in certain particulars. In that case the committee was appointed for strictly local and county purposes, whereas here the object of the appointment is to carry out a great Imperial purpose, but a purpose which is directed by the Act to be administered locally. In that case the funds were provided partly out of moneys applied by the Department of Agriculture and partly out of local rates; in this case the funds are entirely Imperial; but on the question whether the defendant was able to exercise influence that ought to be guarded against, or whether he occupied a position in which his duty and his interest might possibly conflict, those two distinctions are absolutely immaterial.

(1) [1915] 2 I. R. 105.

K. B. Div. 1915. LYNCH v. O'REGAN. Palles C.B.

Considering the character of the Local Government Act, the broadest possible construction ought to be given to the Application of Enactments Order. The change effected by the Local Government Act amounted almost to a revolution. Prior to that Act there were in Ireland a number of bodies—grand juries, commissioners, &c.—with a jurisdiction in local matters, and the object of the Act was that the powers of those bodies should be extinguished, and vested in the county councils which were established in every administrative county and "entrusted with the management of the administrative and financial business of that county": Local Government (Ireland) Act, 1898, sect. 1. The expression "the administrative and financial business" embraces future business as well as that existing at the time of the Act, and is capable of enlargement. It might have been foreseen that Parliament would pass—as it has since passed—many new Acts creating additional administrative and financial business of the county, and directing that such additional business should be managed by a committee appointed by the council; and in construing the Act, and the Application of Enactments Order made in pursuance of it, we must bear that in mind, and have regard to the mischief intended to be remedied. Where you are dealing with a new Act of Parliament casting new duties upon these councils, the question of the mischief aimed at is most important.

Article 12 (6) of the Application of Enactments Order refers to "any committee" of a council, and to "any joint committee" appointed partly by a council, board, or commissioners. In my opinion, the word "committee" in this Order should be so read as to be capable of embracing any committee of a county council, or any committee appointed by the council to manage financial or administrative business relating to the county; and an absolutely determining factor in ascertaining whether such a committee answers that description is whether it comes within the mischief contemplated by the Act. This Act, like the English Act, was aimed largely against jobbery; and the courts ought, I think, to be astute in giving it a construction that will prevent, as far as the words of the order enable them to do it, any jobbery in relation to the management of public business; and to suggest

for a moment that the chairman of a county council could not use his influence to "job" the position of clerk of a committee, the creature of the council, is, in my judgment, idle.

I hold that the local pension committee is a committee of the county council within article 12 (6); and I so hold because the committee is appointed by the council for the management of administrative and financial business concerning the county, and is within the mischief which the section is aimed at remedying. Although the purpose is Imperial, and although the money provided is Imperial money, the Old Age Pensions Act has to be administered locally. For these reasons I am of opinion that the magistrates were wrong, and that the case should be remitted to them with a direction that the offence was proved.

GIBSON J.:—

On one of the two questions discussed I have no doubt. Whether a place of profit under the council is financed out of county funds or from other sources is immaterial. The object of the enactment is to exclude members from all such paid offices, in the interest of purity of administration and efficiency of governing authority.

On the main topic—whether the office was such a one as the Article contemplates—for a considerable time I was inclined to the view that it was not, but on consideration I think that the principle of *Keeffe* v. *Shaughnessy* (1) applies. The committee are appointed and are removable by the council. If a member of the council is able to take part in appointing a committee from whom he is seeking an office of profit, and if he is put in a position where he might possibly prejudice efficient control over him on the part of the committee by securing the removal of a member who should appear to be regarded as unduly energetic and vigilant, the mischief, as Mr. Fitzgerald urged, is manifest. If the committee was composed altogether of members of the council, the conclusion would appear irresistible. The power of appointing outside persons, if the council thinks fit—a power at present (as is

(1) [1915] 2 I. R. 105.

K. B. Div. 1915.

LYNCH v. O'REGAN.

Gibson J.

admitted) only exercised to an infinitesimal extent—does not alter the character of the committee in its relation to the appointing council. My Lord has dealt fully with the nature of the connexion between the two bodies.

The duty in respect of the pension committee is entrusted to the council as a local administrative matter, and the committee representing what is assumed to be a larger body may be (as in *Keeffe's Case*) (1) fairly described as a committee of the council.

Another view, suggested by the English cases referred to in *Keeffe's Case* (1), has occurred to me, namely, that the office might be deemed to be held under the council, the committee being treated as agents or delegates of the council for the purpose of appointment. This view, if it was to be acted on, might involve a trifling amendment of the summons which it would be our duty, dealing with a case stated, to make, as in *Keenan* v. *Costello* (2) and *Bannister* v. *Sullivan* (3). The principle is discussed in my judgment in the *Athy Case* (4). I notice the point, without at all deciding it, lest it should be supposed that the presence or absence of sub-s. 6 of the Article in the Privy Council Order is necessarily decisive one way or the other.

Solicitor for the appellant: *James Lynch.*
Solicitor for the respondent: *T. Hunt.*

C. L.

(1) [1915] 2 I. R. 105.
(2) 44 Ir. L. T. R. 218.
(3) 20 Cox, 685.
(4) [1912] 2 I. R. 64, at p. 85.

WESTPORT PORT AND HARBOUR COMMISSIONERS, APPELLANTS; IRISH INSURANCE COMMISSIONERS, RESPONDENTS (1).

K. B. Div. 1915.

Jan. 12, 13. Feb. 23. April 9.

National Insurance—Employer and Employee—"Employment under any Local or other Public Authority"—National Insurance Act, 1911 (1 & 2 *Geo.* 5, *c.* 55)—*National Insurance Act*, 1913 (3 & 4 *Geo.* 5, *c.* 37), *s.* 6—*Pilots Appointed and licensed by Port Authority under Local Act—Pilotage Rates charged and collected by Port Authority, pooled and divided equally amongst Licensed Pilots.*

Under a local Act, the Westport Port and Harbour Act, 1853 (16 & 17 Vict. c. clxxxv), the appellants, the Commissioners of Westport Port and Harbour, were empowered at discretion to appoint and license qualified persons to act as pilots, with power at discretion to remove such licensed pilots, and appoint and license new pilots, and to suspend a licence. Power to fine the licensed pilots in certain cases was conferred upon the appellants, and when that power was exercised the fine was placed in the general harbour fund. The statute forbade pilotage except by duly licensed pilots, and made pilotage compulsory on all vessels using the port, subject, on breach of this latter provision, to payment by the master, &c., of a vessel to the proper officer of appellants, of double pilotage. The appellants were empowered to charge and recover, as and for pilotage rates, the sums specified by the Act; to reduce, abate, or abolish such rates at discretion; and to make bye-laws or rules regulating the condition of pilotage. All rates, tolls, or charges under the statute were made applicable at the discretion of the appellants to general harbour purposes.

No rule or bye-law regulating pilotage was proved. The practice of the appellants for an indefinite period of time, extending over at least thirty years, had been to receive the pilotage rates, to pool the sum so received, and pay out the same quarterly in five equal shares to the five licensed pilots of the port.

Held (by Cherry L.C.J. and Gibson J., Dodd J. diss.), that the pilots appointed and licensed by the appellants were not employees of or under the appellants, and that the latter were not liable to contribute to insurance of the pilots under the National Insurance Acts, 1911 to 1913.

Held by Dodd J., that, having regard to the provisions as to control of the pilots and pilotage rates; the fact that pilotage rates could be applied in part by the appellants to general purposes; and that no power was given to the

(1) Before CHERRY L.C.J., and GIBSON and DODD JJ.

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

pilots to bargain with or recover from the ship in respect of pilotage rates, the relation created by the local Act between the pilots and the appellants was that of an "employment under" a local authority within the provisions of the National Insurance Acts, 1911 to 1913.

The above-mentioned provisions of the local Act have not been repealed by subsequent general legislation.

CASE STATED pursuant to 20 & 21 Vict. c. 43, at the instance of the appellants, the Westport Harbour Commissioners.

At a petty sessions held at Westport on the 19th and 26th of November, 1914, the justices who stated the case heard a complaint by the respondents, the Irish Insurance Commissioners, against the appellants, the complaint charging that the appellants had failed to pay a contribution of 5½*d.* for one week commencing on the 29th June, 1914, in respect of one William Gibbons, he being an employed contributor within the meaning of the National Insurance Acts, 1911 to 1913.

The facts proved or admitted at the hearing were stated in the case as follows:—

"By virtue of a local Act, known as the Westport Port and Harbour Act, 1853, sect. 23, the said defendants [the appellants] are empowered, *inter alia*, to appoint and license from time to time such duly qualified pilots as they think proper to act as pilots, and from time to time to remove such pilots and appoint and license others in their stead. The defendants did so appoint five pilots, of whom the said William Gibbons is one.

"2. Furthermore, under the same section of the said Act, it shall not be lawful for any person or persons to act as pilots within the limits specified by the said Act other than such person or persons as may be appointed by the said defendants, provided always that the service of one or other of such pilots shall be available.

"3. The said defendants have a discretionary power to grant or to refuse, to suspend or to withdraw, such pilotage licence.

"4. They are empowered also to charge and recover, as and for pilotage rates, the sums set forth in the Schedule A to the said Act, and furthermore at their discretion to reduce or abolish the said charge for pilotage.

"5. By sect. 24 of the said Act the said defendants are empowered to fine any person who, not being so licensed, offers himself as a pilot.

"6. By sect. 25 of the said Act the master of a vessel who refuses to take on board and employ such licensed pilot as shall offer his services shall pay to the proper officer of the said defendants double pilotage over and above any other penalty to which such master may be liable.

"7. By sect. 27 of the said Act the defendants are empowered to make from time to time such bye-laws as they think fit for regulating the duties of pilots.

"8. By sect. 36 the said defendants are empowered to borrow money on the credit of the several rates and tolls, and may assign over the rates, tolls, and property to the persons who shall advance or lend such money.

"9. By sect. 38 of the said Act the defendants may, *inter alia*, apply moneys received by or from the rates, tolls, or duties, in defraying the expenses of maintaining, regulating, and improving the harbour and generally of carrying the said Act into execution or in any manner relating to the execution thereof, or of any other thing to be done by virtue thereof.

"10. There is no record that the pilotage rates were ever paid otherwise than to the defendants by the masters or owners of vessels, or that the pilots ever demanded such payments from the masters or owners.

"11. By a custom of indefinite duration, but extending over 30 years, the pilotage rates received by the defendants were added together and were distributed in equal shares and without deduction to the said five pilots quarterly.

"12. Of the said five pilots one, Patrick Hopkins, was fined by the defendants the sum of £5 for failing to bring up a boat in rough weather. The said sum of £5 was paid into the ordinary fund of the defendants.

"13. The said pilots received a copy of regulations made by the defendants, and performed their duties in accordance with those regulations; they provided their own boats and tackle, and paid their own crews, and took it in turns to keep a 'look-out.' Provided the said pilots performed the duties specified by the

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

defendants, they were not debarred from engaging in other work.

"14. The defendants had no funds available for paying insurance in respect of the said pilots, save such sums as they received as pilotage rates.

"15. The defendants contended that they merely granted licences to certain persons to act as pilots, and that to 'license' was not to 'employ.' They relied upon certain sections of the Merchant Shipping Act of 1913 to show that the pilots were employed by the masters and owners of vessels and earned their money under direct employment with such masters and owners, and that the defendants only collected the earnings with the consent of such pilots and as their agents, and the defendants merely handed the pilots their own actual moneys, and that there was no contractual relation between the defendants and the pilots. We, by a majority, Mr. John Walsh, J.P., dissenting, held the contrary view, and convicted the defendants . . . and the opinion of the Court is sought as to whether we were right in law in making such order."

The following are the material provisions of the Local Act, 16 & 17 Vict., cap. clxxxv:—

Section 23. . . . And it shall also be lawful for the commissioners from time to time to appoint and license such pilots as they shall think proper to act as well within the limits of the said harbour, as in piloting vessels from Clare Island to said harbour; and from time to time, at their discretion, to remove such pilots, and to appoint and license others in their stead; and it shall not be lawful for any person or persons to act as pilots within the limits of the said harbour, or from Clare Island to said harbour, other than such person or persons as may be appointed and licensed by the said commissioners under the power for this purpose herein contained; and the said commissioners shall be at liberty to charge and recover as and for pilotage rates the sums set forth in the Schedule (A) to this Act annexed: Provided, nevertheless, that it shall be lawful for the commissioners at any time hereafter, at their discretion, by any rule or bye-law of the commissioners from time to time to abate, reduce, or abolish the said charge for pilotage on all or any class of vessels entering or

leaving the said port and harbour, or to leave it optional with masters, commanders, owners, or other persons in charge of coasting, steam, and other vessels, whether to employ or take on board any pilot.

24. That any person offering himself as pilot to any vessel off or in the port and harbour shall declare whether he be duly appointed and licensed by the commissioners to act as pilot or out-pilot pursuant to the directions of this Act; and if any person so offering himself, and not licensed, shall at the time he shall so offer himself as pilot or out-pilot declare himself to be so authorized and appointed as aforesaid, every such person shall for every such offence forfeit any sum not exceeding ten pounds.

25. That in case the master, owner, or other commander of any vessel, inward or outward bound, who is required by this Act to employ a pilot, shall refuse to take on board and employ a pilot, so to be licensed as aforesaid, who shall offer his services (unless such master, owner, or commander shall himself be a licensed pilot), such master, owner, or commander shall pay or cause to be paid to the proper officer of the commissioners, double pilotage, according to the different rates and prices herein directed to be paid, over and above any other penalty to which such master or commander may be liable.

26. That, notwithstanding anything herein contained to the contrary, it shall not be compulsory on the master, commander, or other person in charge of any vessel entering the said port and harbour, or departing therefrom, to take or receive on board within the limits of out-pilot ground . . . any out-pilot, but that the taking of any out-pilot on board shall be optional with such master, commander, or owner: Provided always that in all cases where a vessel shall have previously made a signal for a pilot, or shall have, at the time of any out-pilot offering, a signal for pilot flying, such vessel shall be liable to pay the usual charge for the pilotage of such vessel, whether such vessel shall have received or taken on board such out-pilot or not.

27. That the commissioners may from time to time make such bye-laws as they shall think fit for all or either of the purposes following, that is to say:—For regulating the duties of pilots . . . employed in or about vessels; for licensing porters, watermen,

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

and boatmen, and such bye-laws shall be subject to the same provisions and restrictions as are prescribed by "The Harbours, Docks, and Piers Clauses Act, 1847," with respect to the bye-laws to be made by the undertakers under such Act.

28. That nothing herein contained shall be deemed to exempt the said port and harbonr of Westport from the provisions of any general Act for the regulation of pilots which may be passed during the present or any future session of Parliament.

38. That all moneys which may arise or be received by or from rates, tolls, or duties hereby granted, and all moneys which may be borrowed on the credit or be received by virtue of any of the provisions of this Act, shall be applied by the said commissioners in the manner following, that is to say:—In the first place, in paying and defraying the costs, charges, and expenses which shall be incident to and attending the soliciting, obtaining, and passing of this Act; secondly, in paying the interest of the moneys to be borrowed under the provisions of this Act; and thirdly, in laying by an annual sum of money, as directed by this Act and "The Commissioners Clauses Act, 1847," to be laid by for the purpose of paying off the sums borrowed under this Act in twenty years; and, fourthly, in defraying the expenses of maintaining, regulating, and improving the harbour, and generally of carrying this Act into execution, or in any manner relating to the execution thereof or of any other thing to be done by virtue thereof.

SCHEDULE A.

[A scale of rates was set out, the rates varying according to the registered tonnage of the vessel.]

The following is the form of licence issued by the Westport Harbour Board to a pilot:—

"LICENCE.

"PORT AND HARBOUR OF WESTPORT.

"LICENCE FOR HARBOUR PILOT.

"We, whose names are hereunto subscribed, being Harbour Commissioners under the 'Westport Port and Harbour Act, 1853,' do certify that we do hereby license and empower , of who is duly qualified to act as pilot within the following limits, that

is to say, from 'out Pilot Ground to Westport Quay' or anywhere within the limits of the Port and Harbour of Westport, and the following is a description of his person. [Description set out.]

"This licence is to be produced by the said to the captain of every vessel as soon as he shall board her and to be returned to the Westport Harbour Commissioners whenever required under penalty of Ten Pounds.

"Given under our hands," etc.

Price (with him *Godfrey Fetherstonhaugh*, *K.C.*), for the appellants:—

The pilots in this case do not carry on their work under any contract of service with the appellants. The appellants license persons to act as pilots, and the latter discharge their functions by piloting vessels in and out of the port. There is no contract to serve the appellants, and, therefore, the case of these pilots is outside the National Insurance Acts, 1911 to 1913. If there is any "employment" of the pilots at all, it is employment of them by the ship. A licensee is not a person employed under the licensing authority, the employment contemplated by the Insurance Act being "employment as an employee." The sections of the Merchant Shipping Acts of 1854 and 1894, and of the Pilotage Act of 1913, show that the Legislature recognizes pilots as independent traders. Either these sections replace the provisions of the local Act of 1853 or they do not. If they do replace those provisions, the appellants would not be liable; if they do not, the provisions of the local Act itself do not create the relation of employer and employee between the Harbour Board and the pilots: *Wilmerson* v. *Lynn and Hamburg Steamship Co.* (1).

The actual practice has been to pool the pilotage rates and to pay all the rates in equal shares to the pilots. This course may be outside the powers conferred by the local Act; but if it be not, it illustrates the actual relationship with which the Insurance Act must deal. If the pilots are treated as entitled to the entire of the pilotage rates as earnings, it must be on the basis that the pilots are independent undertakers entitled to all their earnings,

(1) [1913] 3 K. B. 931.

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

subject only to permission by licence to pursue their particular calling. The licence is necessary to protect public life, like the licence to a medical man.

Lord Halsbury, in his judgment in *Shaw, Savill, and Albion Co.* v. *Timaru Harbour Board* (1), thus describes (p. 436) the legal status and position of a pilot :—" But their [the Harbour Board's] sole duty as constituted by statute, in respect of pilots, was to license pilots, between whom and themselves the only relation which the law contemplated as existing was that they should be under their supervision and under their jurisdiction for the purpose of being duly licensed." In that case apparently no pilotage rates were fixed, but the mere fixing of pilotage rates by the local Act, coupled with power to the appellants to abate, reduce, or abolish them, does not alter the status of the pilot. The fixing of the rate for pilotage no more constitutes the pilot an employee of the appellants than the fixing of legal fares for hackney cars constitutes licensed carmen employees of the body controlling the fares. The appellants, it is true, received the pilotage rates, but they received the rates in fact as receivers for the pilots, who were treated as entitled to the whole of the pilotage receipts.

Richard Sheehy and the *Solicitor-General* (*James O'Connor K.C.*), for the respondents :—

The pilots may be regarded as entering into contracts of service with the ships they pilot as the agents of the appellants who appoint and license them: *County Council of Down* v. *Irish Insurance Commissioners* (2); *Irish Insurance Commissioners* v. *County Council of Tipperary* (3). But it is not necessary in this case to rest the liability of the appellants on any contract of service, since the appellants are a local authority, and, under the Act of 1913, if the pilots are "employed under" the appellants the latter are liable for the insurance contribution. Control is a very strong element in the test of whether or not the relationship of employer and employee exists : *Jones* v. *Scullard* (4). "Employment" under the National Insurance Act, 1913, must mean the

(1) 15 A. C. 429.
(2) [1914] 2 I. R. 120.
(3) 48 I. L. T. R. 211.
(4) 2 Q. B. 565.

person's regular occupation; if there was any employment of the pilots by the ship, it is not the class of employment contemplated by that Act. The regular occupation, the permanent "employment," of the pilots is their work of piloting subject to the supervision of the appellants. The pilot cannot here make his bargain with the ship; he can be removed by the board, and the pilotage rates could be applied in part towards harbour expenses under section 38 of the local Act. The pilot neither contracts with the ship nor is he an independent trader; he is an employee of the appellants.

Fetherstonhaugh K.C., in reply:—

There is no employment as between the appellants and the pilots; there is merely a *status* created by the local Act. The licence to the pilot is similar to the licence granted to a cabman. It is a qualification, not an employment, and it is a condition of the pilot's calling imposed by the Legislature in the public interest; it permits the pilot to act, but does not constitute his work as pilot an employment under the licensing authority. The Workmen's Compensation Act, 1906, sect. 7, sub-sect. 3, recognizes a pilot as being an employee of the ship.

[The case was further argued on the effect of the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31). The sections of this statute, as well as the sections of the Merchant Shipping Acts, 1854 to 1894, referred to in the argument, are sufficiently dealt with in the judgments.]

Cur. adv. vult.

DODD J.:—

The case turns upon the construction of three different sets of statutes.

The first set contains two Acts—the National Insurance Act, 1911, and the National Insurance Act, 1913.

The second set has only one Act—a local and personal Act, the Westport Port and Harbour Act, 16 & 17 Vict. c. 185.

The third set comprises various Merchant Shipping and Pilotage Acts, of a public and general character, but particularly the Merchant Shipping Acts, 1854 and 1894, and the Pilotage Act, 1913.

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. v. IRISH INSURANCE COMMRS.

Dodd J.

The question involved is, Are the Westport Harbour Commissioners under a statutory obligation to pay a contribution to the insurance of the pilots engaged in the port?

The parts of the National Insurance Act that require consideration are section 1 and the First Schedule.

By section 1, all persons of the age of sixteen and upwards who are employed within the meaning of Part I of the Act shall be insured. They are referred to as "employed contributors." The schedule sets out and defines "employment" within the meaning of Part I as follows:—"Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether express or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by piece, or partly by time and partly by the piece."

The words "contract of service" raised some questions of apparent difficulty, and in consequence of a legal decision thereupon the National Insurance Act of 1913 (3 & 4 Geo. 5, c. 37) was passed. In section 6 it is enacted:—"There shall be added to Part I of the First Schedule to the Principal Act, which specifies the classes of employment which is employment within Part I of the Principal Act, the following paragraph:—(*e*) Employment under any local or public authority, except such as may be excluded by a special order." There is no special order here, and the question, therefore, is, are the pilots persons in employment under the local authority?

The words are intentionally wide, and are words in common use, to which no scientific legal meaning is attached. Having regard to the whole scope of the Act, however, I think that the word "employment" must be limited to an employment in the nature of personal service. An independent contractor may be said, in one sense, to be employed by the authority that enters into a contract with him; but, in popular parlance, such a contractor would not be said to be in employment *under* the local authority. The persons sought to be brought within its scope are persons in service. But all persons who are in service under the local authority are brought within the beneficent provision of the Act as "employed contributors." The question

thus takes another form—Are the pilots "employed contributors"?

There would seem to be three possible answers—First, they are not in the employment of anyone. They are persons carrying on a separate calling—independent contractors. A pilot is his own master. Second, they are in the employment of the ship; or, third, they are in the employment of the harbour authority.

The word "pilot" does not of itself, in my opinion, necessarily carry with it any of the three answers. The analogy of a car-driver was much relied on in the argument; but a car-driver may be a man carrying on an independent business, or he may be in the employment of a private employer, or he may be, as in some places in England, employed by the local authority. In each of the three he may require a licence from the local authority. But if he be a driver of corporation vehicles, he would, in my opinion, be in employment under the corporation. In the other two possible relations of course he would not. You must find a solution to your query, not in the word, but in the actual relation existing between the pilot and the persons for whom he works. Nor is the fact that a licence is requisite a determining factor. A local authority may license without employing, or it may both license and employ.

We have to go, therefore, to the second branch of the case to find out what are the relations between the pilots of Westport and the Westport Harbour Commissioners. Those relations are regulated by the local and personal Act to which I have alluded. I regret to say I must go through, in some detail, the provisions of the Act. And I must do more. I must point out what the Act does not provide.

The Westport Port and Harbour Act (16 & 17 Vict. c. 185) enacts by sect. 23:—"And it shall also be lawful for the Commissioners from time to time to appoint and license such pilots as they shall think proper to act as well within the limits of the said harbour as in piloting vessels from Clare Island to said harbour, and from time to time, at their discretion, to remove such pilots, and appoint and license others in their stead. And it shall not be lawful for any person or persons to act as pilots within the limits of the said harbour, or from Clare Island to said harbour, other than

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

Dodd J.

such person or persons as may be appointed and licensed by the said Commissioners under the power for this purpose herein contained. And the said Commissioners shall be at liberty to charge and recover as and for pilotage rates the sums set forth in the Schedule (A) to this Act annexed. Provided, nevertheless, that it shall be lawful for the Commissioners at any time hereafter, at their discretion, by any rule or byelaw of the Commissioners, from time to time to abate, reduce, or abolish the said charge for pilotage on all or any class of vessels entering or leaving the said port and harbour, or to leave it optional with masters, commanders, owners, or other persons in charge of coasting, steam, and other vessels, whether to employ, or take on board, a pilot or not."

Mr. Fetherstonhaugh draws a distinction between "appointing" and "licensing." The words in the Act point to one act, "appoint and license." The licence follows upon, and is the authoritative voucher for the appointment, and to ships is the evidence of the pilot's authority.

It is to be noted that no power is given to the pilot to sue the ship. The harbour authority is to *charge and recover as* and for pilotage rates; and power is given to the local authority to abate, reduce, or abolish the charge.

Under section 25, if the master, owner, or other commander of any vessel shall refuse to take on board and employ a pilot so to be licensed as aforesaid, who shall offer his services (unless such master, owner, or commander shall himself be a licensed pilot), such master, owner, or commander shall pay or cause to be paid *to the proper officer of the Commissioners* double pilotage, according to the different rates and prices herein directed to be paid, over and above any other penalty to which such master or commander may be liable.

And it is specially enacted (section 28) that "nothing herein contained shall be deemed to exempt the said port and harbour of Westport from the provisions of any general Act for the regulation of pilots which may be passed during the present or any future session of Parliament." This is relied upon on the third branch of the case for the purpose of drawing an inference that the relations of the pilots to the Commissioners are superseded by the general Acts. I shall deal with it later. I note here this

only. It is not the pilots who are restrained; it is the local authority. The regulations of the local authority must be subject to and in conformity with the general law for the regulation of pilots.

Section 38 runs as follows:—"All moneys which may arise or be received by or from the rates, tolls, or duties hereby granted shall be applied by the Commissioners in the manner following," that is to say, in the first place, in paying costs, &c., of obtaining the Act; secondly, in paying interest on moneys borrowed, &c.; thirdly, in providing a sinking fund to pay off borrowed moneys inside twenty years; and, fourthly, "in defraying the expenses of maintaining, regulating, and improving the harbour, and generally of carrying the Act into execution, or in any matter relating to the execution thereof, or any other thing to be done by virtue thereof."

There are three schedules which are of some importance. Schedule (A) is headed "Every vessel entering the Port and Harbour of Westport shall pay as and for *Pilotage Fees* the following *rates*"; Schedule (B) sets out *rates* for shipping dues; and Schedule (C) is headed, "Every vessel entering or departing from the Port and Harbour of Westport shall pay as and for *Harbour Dues* the following *rates*."

Another portion of the Act which may be material is the recital—"And whereas, in order to provide the requisite funds for the purposes aforesaid, it is expedient that the Commissioners hereinafter named should be empowered to levy tolls, rates, and duties upon all vessels using the said port and harbour."

Upon this summary of the Act, which I think is accurate, and is sufficiently full, I desire to express my opinion as follows:—

1. There is no privity of contract by the Act created between the pilots and the ship.

2. The pilot cannot sue for or recover the pilotage rates specified in the Act.

3. The Act does not provide that the pilotage fees recovered by the local authority shall be paid to the pilots. It does not provide that the rates for pilotage shall be segregated or kept apart for the exclusive use of the pilots. It does not contain any provision as to how the remuneration for the service of a pilot

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

Dodd J.

shall be determined. It does not provide that each pilot shall get the pilotage fees that he has earned. It leaves all that to the Commissioners under their general powers to manage the harbour. They are not bound by the Act to give all the pilotage rates to the pilots. They are not restrained from giving to the pilots more than the pilotage rates produced. If the shipping was not sufficient to pay a living wage to one pilot, the local authority could make it up, so as to attract shipping to the port. It follows that they could have set apart a portion of the rates to do the very thing aimed at by the Insurance Act and the general Pilotage Acts, to which I shall soon refer. What they did in fact do was this:—They collected all the pilotage rates. They appointed five pilots. They divided the rates into five equal shares, and paid the five pilots equally in respect of the work done by each. If a pilot was fined, the fine went into the ordinary fund of the Commissioners; and if double pilotage rates were enforced, those rates would equally go into the general fund.

Was each pilot, then, an independent contractor, or were the five pilots employed? I think the answer must be that they were employed, and, if employed, they were employed under the local authority.

It was urged, however, that this arrangement was, first, ultra vires, and, second, that it was not sanctioned by any "rule" or bye-law. It has been of indefinite duration, lasting for at least thirty years. If I am right in my interpretation of the Act, the Harbour Commissioners had full power to make any bargain with those who sought to be appointed pilots, exactly as they could have made a bargain with a harbour master, a clerk, or other such person employed under them. And evidence of an appointment can be given as a fact; if necessary, a "rule" would be presumed; but it is not necessary. The terms of the employment can be sufficiently gathered from what was in fact done, and, in addition to all this, the National Insurance Acts deal with existing relations, and not with legal technicalities.

The counsel for the port contend strenuously that this interpretation of the Act is erroneous; but they say, even if it be right, the relations so created under this local Act have been modified and repealed by subsequent general Acts. There is no express

repeal, but they say that there is an implied repeal, as all the recent Acts are based upon the assumption that the pilot is an independent official, entitled to sue for his own fees; and almost every section of the Merchant Shipping Acts, as regards pilots, and, on the second hearing, almost every section of the Pilotage Act of 1913, have been subjected to a rigid and detailed analysis. I am embarrassed by the multiplicity of the points so urged. I cannot go through each section, and I must, therefore, without any discourtesy to the counsel who so strenuously relied upon these points, endeavour to deal with typical cases.

As to the Merchant Shipping Act of 1894, sections 592, 593, and 594 are put in the front of the argument. Section 592 enacts that a qualified pilot shall not demand or receive, and a master shall not offer or pay, to any pilot any other rate in respect of pilotage service whether greater or less than the rate which may be demanded by law. Section 593 provides that if a boat or ship having on board a qualified pilot leads any ship which has not a qualified pilot on board when the last-mentioned ship cannot from particular circumstances be boarded, the pilot so leading the last-mentioned ship shall be entitled to the full pilotage rate for the distance run, as if he had actually been on board and had charge of the ship. Section 594 is specially pressed. A pilot who is taken, under certain circumstances, beyond the limits for which he is licensed shall be entitled, over and above *his* pilotage dues, to the sum of 10*s.* 6*d.* a day.

And with these I may group section 597. A qualified pilot may supersede an unqualified pilot, but the master shall pay to the unqualified pilot a proportionate sum for his services, and deduct that sum from the charge of the qualified pilot; and, in case of dispute, the pilotage authorities by whom the pilot is licensed shall determine the proportionate sum to which each pilot is entitled.

Upon these sections I have to say that they apply in terms to pilots who are entitled to demand and receive fees on their own behalf. They do not apply to pilotage rates payable to and receivable by the local authority; and the duties of pilots outside the district, as between the ship and the local authority, are specified in the local Act. In any event I cannot construe these

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. v. IRISH INSURANCE COMMRS.

Dodd J.

sections as giving to the pilots a right to recover fees which was not given to them upon their appointment as pilots, nor can I interpret them as repealing the local Act.

More difficult questions arise upon the Pilotage Act of 1913 (2 & 3 Geo. 5, c. 51). Having regard to that Act, the present controversy seems to be of minor importance, for it is clear that all the local regulations can be revised. But though there are some provisions that tend in another direction, with which I shall deal, I think, on a full and detailed consideration of that Act, my view as to the meaning and continued force of the provisions of the local Act is strengthened. The first section gives power to the Board of Trade to carry into effect any re-organization or improvement of organization which the Board may consider necessary or expedient at any port, and directs that they "shall also at any port deal by Pilotage Order with any Act, order, charter, custom, bye-law, regulation, or provision in force at the port, with a view to rendering the law relating to pilotage at the various ports in the United Kingdom accessible, and, so far as possible, uniform."

No such order has been made as yet, and the inference would seem to be that though the provisions in this port and others in Ireland may not be uniform with the general scheme of pilotage in the English ports, they are not therefore illegal.

The Pilotage Orders which the Board of Trade may make (sect. 7) contain provisions analogous to the arrangements here made between the local authority and the local pilots; and sect. 58, I think, is of great weight. It enacts that "where a pilotage authority is entitled by statute at the time of the passing of this Act to receive moneys in the name of pilotage, and to apply part of such moneys to purposes other than those authorized under this Act, a pilotage order made under Part I of this Act in respect of that authority may provide for the apportionment of the moneys so received as between the pilot fund or account and such other purposes." That section recognizes the right of a local authority, if it is empowered by statute to receive moneys in the name of pilotage, to apply them to other purposes. If I am right in my interpretation of the local Act, that right is conferred by statute, and is preserved by sect. 58, and is not inconsistent with the general Acts regulating the duties of pilots.

I recognize that the same objects aimed at by the Insurance Acts can be obtained under the Pilotage Act of 1913. I recognize the desirability of putting all pilots upon the same footing. I recognize, too, that the trend of legislation is to throw the pilot upon the ship, and not upon the local rates. The ship is made answerable under the Workmen's Compensation Act, as if it were the employer. The Act of 1913 contemplates that after the 1st of January, 1918, the owner of a vessel will be answerable for the negligence of the pilot, even where pilotage is compulsory. But there is nothing to prevent in fact this burden falling upon the ship. The pilotage rates may, according to my view, be struck, if the Board of Trade so permit, so as to include (*a*) adequate remuneration to the pilot; (*b*) a sum in addition for the ordinary outlay of the port; (*c*) a sum which may be applied, either by the local authority itself in providing for sickness and retiring pensions, or by paying the contribution to the Insurance Commissioners.

There remains to consider whether there is any reported decision which may modify or alter the conclusion thus arrived at. The authorities cited of *Henly* v. *Mayor of Lyne* (1), cited for a passage at p. 110, is relied upon by Mr. Fetherstonhaugh.

I do not think that the *County Down Insurance Cases* (2), nor the *Tipperary Case* (3), are relevant to our present inquiry. They rest upon their own statutes and their own facts.

The case that seems to be most valuable is the case of *Shaw, Savill, & Co.* v. *Timaru Harbour Board* (4). In that case the Privy Council held that upon the true construction of the Timaru Harbour Act and the Harbour Act, 1878, the Timaru Harbour Board had no authority to enter into pilotage contracts, but only to license pilots. The sections are sufficiently indicated in the judgment of the Privy Council, pronounced by Lord Halsbury at p. 434. "Their sole duty, as constituted by statute in respect of pilots, was to license pilots, between whom and them the only relation which the law contemplated as existing was that they should be under their supervision and under their jurisdiction for

(1) 5 Bing. 107.
(2) [1914] 2 I. R. 110.
(3) 48 I. L. T. R. 211.
(4) 15 A. C. 429.

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. v. IRISH INSURANCE COMMRS.

Dodd J.

the purpose of being duly licensed; *but once licensed the pilot had to make his own bargain with the shipowner.*" "The statute," he goes on, "and the rules made under it, seem carefully worded, so as to exclude the notion that the Harbour Board in its corporate capacity is acting as pilot for the vessels frequenting the harbour."

In Westport the pilot cannot make any bargain.

The case of *Wilmerson* v. *Lynn and Hamburg Steamship Company, Limited* (1), is conversant with meters and weighers, and at first I thought it was decisive against the Commissioners of National Insurance in this case; but, here again, the ground of decision, I think, clearly differentiates the two cases. The Court held that there was evidence in that case of a contract of service between the meters and the ship. Cozens Hardy M.R. held that the meter was not an independent contractor; he must be in somebody's service, and he said if the shipowners were not his employers, he felt a difficulty in saying who were. But, in that case, the meters were entitled to make charges for the services rendered by them, and to recover those charges from the ship.

The qualified-nurse case, *Hall* v. *Lees* (2), referred to by Judge Mulligan, illustrates the distinction. I adopt his judgment. He says: "I think that the organizing and licensing of a class of men competent and qualified to undertake a particular service by a public body . . . does not of itself constitute a contract of service by that body." I quite agree.

On the other hand, the Irish decision as to the schoolmaster (*In re National Insurance Act*, 1911 (*Pupil Teachers and Monitors*)) (3) shows that there may be such a contract. It is to be borne in mind, moreover, as to this case, that it turned upon the first Act, where contract of service was essential; and I think the Act of 1913, in its more general words, gives a clearer indication of the meaning of the Legislature.

The pooling of their earnings in *Wilmerson's Case* (1) was the act of the licensed men, and, more important still, the amount

(1) [1913] 3 K. B. 931.
(2) [1904] 2 Q. B. 602.
(3) [1913] 1 I. R. 219.

was received by the head man, who alone was entitled to receive the money.

These cases, in my opinion, support my view that the provisions of the general Acts do not affect the relations *inter se* of the pilots and the local authority. They place certain restrictions upon pilots, when acting as their own masters, and they confer privileges upon pilots generally; but they do not repeal the local Act, which is still in full force and validity.

For these reasons I am of opinion that the magistrates were right in their decision.

GIBSON J.:—

Had the status of the Westport pilots been governed by the Pilotage Act of 1913, c. 31, alone, I should have decided without hesitation that the harbour authority was not liable. The difficulty is caused by the Westport local Act. I propose to consider—(1) the effect of the local Act taken by itself; (2) whether sections 23 and 38 of that statute are inconsistent with the Act of 1894, and are thereby repealed, so that they were not in force when the Pilotage Act of 1913 was passed, and were not within sect. 59 of that enactment; (3) the construction of the Pilotage Act of 1913; (4) the operation and result of the course of dealing as to pilotage dues described in paragraphs 10 and 11 of the case stated; (5) whether the status of the Westport pilots, in existing conditions, makes them employees under the board within the National Insurance legislation.

The case sets out the facts with clearness. Paragraph 14 however, which states that there are no funds available for insurance contributions save what are received for pilotage rates, represents what is rather a matter of law than one of fact. If the harbour receipts may be applied in part for general purposes, and, *a fortiori*, if they are massed in a common fund without any obligation to keep separate accounts, and without any special trust or appropriation affecting pilotage rates, paragraph 14 would be incorrect in law. If it was well founded, it would supply a powerful argument against holding the harbour authority to be

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. v. IRISH INSURANCE COMMRS.

Gibson J.

employers or quasi-employers or pilots, who, in that view, would bear, at their own expense, the employer's contribution as well as their own proper share.

1. As to the Westport Act. The local authority is invested with absolute discretion as to appointment, licensing, and removal of pilots. The board charges and recovers the pilotage rates specified, and may reduce or abolish such rates in particular cases. There is no provision requiring the pilotage rates, when recovered, to be paid over to the pilots. The board is not made a trustee of such receipts, and it might, apparently, make its own bargain with the pilots, who, if discontented with their remuneration, might resign. All receipts, including pilotage dues, may be applied under sect. 38. Taking sects. 23 and 38 together (which, as stated further on, correspond with the local legislation regulating most Irish ports), I am of opinion that, in the absence of special arrangement with the pilots, the board could apply portion of the pilotage receipts for general harbour purposes. Such receipts, when paid into the general fund, would lose their separate identity. They are not the property of the pilots, who could not enforce payment of them from the ships, and who could not compel the harbour authority to hand them over as received on their behalf.

2. The subsequent statutes from 1854 to 1894 represent reproductions of legislation on divergent lines which it is not easy to harmonize. Some sections, if taken alone, would suggest that the pilots were to be paid directly by the ship which employed them; if in every case pilots were given such right, provisions in the local Act to the contrary effect would be repealed. I do not think, however, that the sections referred to have such effect. Similar provisions occur in the Act of 1913, which recognizes the existence of diverse local pilotage enactments (sects. 1 and 59), and expressly, in sect. 58, preserves the rights of pilotage authorities by statute entitled to receive and apply pilotage dues. It was suggested that this section might relate to statutes after 1894 giving such powers; but it would be unlikely that, if the statute of 1894 repealed previous local legislation as to the allocation of pilotage dues, the Legislature would have subsequently enacted local Acts containing similar provisions. A list of the various

local statutes relating to pilotage is given in Marsden on Collisions (1910 edition, pp. 247 to 262). The Westport Act is one of a numerous class intended to be preserved under sect. 58 of the statute of 1913. No Act like the Westport Act has, apparently, been passed since 1894.

A further argument against construing sects. 49 and 50 as exclusive, and confining the right of suing and receiving to the pilot employed by the ship, is found in sect. 55, which enables the chief officer of Customs and Excise to collect dues. Similarly, sect. 21 treats the pilotage authority as receiving pilotage money. Sects. 49, 50, and 55 are re-enactments of provisions in previous statutes.

The Act of 1894, in dealing with a pilot as if capable himself of enforcing and receiving payment, is not inconsistent with, and does not repeal, the authority conferred by the local Act on the board to recover and appropriate pilotage charges.

My conclusion as to the construction of the Westport Act, and as to its being, to the extent above stated, still in force and unrepealed, is confirmed by other local Acts which contain similar provisions as to recovery and disposition of pilotage rates. As to Ballina, 23 & 24 Vict. c. 165; Coleraine, 26 & 27 Vict. c. 100; Belfast, 10 & 11 Vict. c. 52; Dundalk, 18 & 19 Vict. c. 189; Galway, 16 & 17 Vict. c. 207; Waterford, 9 & 10 Vict. c. 292; Wexford, 37 & 38 Vict. c. 40. The dates of these enactments (several after the general statutes of 1854 and 1862, and all before 1894), and their number, are important in considering the problem now before us.

3. Though the Westport Act, as to collection and application of pilotage rates, was not displaced by the Act of 1894, and was, therefore, under sect. 59 of the Act of 1913, kept in force until superseded by a Pilotage Order, the status of the pilot was materially altered by the Acts 1854, 1894, and 1913, as to rights, obligations, and offences; sects. 24, 27, 28, 30, 31, 33, 34, 35, 46, and 48 of the statute of 1913 (reproducing earlier legislation) show this. While licensed a pilot must serve. He is an independent official, and is not subject to the direction and control of the harbour authority in the discharge of his duties when acting. His position is anomalous. While compulsorily employed, the

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

Gibson J.

shipowner is not responsible for his negligence, though by the Act of 1906, c. 58, s. 7, sub-s. 3, he is, when employed by a ship, made a member of the crew for the purpose of compensation. On the other hand, the grant or renewal of a licence by a pilotage authority under the statutory power does not impose any liability on the pilotage authority for loss occasioned by his act or default. Whether the same immunity would be enjoyed if the authority received and appropriated pilotage receipts partly for harbour purposes, would present a problem which need not be now considered, and as to which I offer no opinion one way or the other.

4. The course of dealing, described in the case, under which pilotage receipts are pooled (an arrangement contemplated as legitimate under the Act of 1913, sect. 17 (*g*)), and divided between the pilots, represents a consensual and revocable arrangement, which, while in operation, binds the parties. If altered to the prejudice of the pilots, they could decline to act, and could resign. In any event, it could not be changed so as to interfere retrospectively with the right of the pilots to receive dues already accrued and earned. The effect of the arrangement was, that the board only acted as receivers of money treated as earned by, and belonging to, the pilots.

5. The main arguments against the board being deemed employers or quasi-employers within the National Insurance Acts are: (1) the independent position of pilots as regards duties, rights, and liabilities; (2) their rights, in existing conditions, to receive the whole pilotage receipts. I think that these arguments displace the existence of any contract of service between them and the board under the principal Act. The amending Act of 1913, c. 37, sect. 6, however, adds to the classes of employment in the first schedule of the principal Act, employment under any local or other public authority, except as therein specified. Counsel on both sides agree that sect. 6 was intended to deal with the decision in the *South Dublin Union Case* (1), where it was held that union officials under guardians were not employees under a contract of service with the board performing administrative duties imposed

(1) [1913] 1 I. R. 244.

by statute. The Solicitor-General contends that the section, where it applies, eliminates altogether the existence of a contract of service as a condition. The exact operation of the amendment is difficult, and I do not propose to define it. But the position of union officials is very different from that of the Westport pilots. No doubt the Harbour Board is a local or public authority, but the word "employment" indicates employment of persons *as employees*. It appears to me clear that pilots as a class are not employees under the pilotage authority which licenses them. Such authority is not responsible for their acts or defaults, and the only direct remedy given to them for injuries is against the ship. Whether the owner or master obtaining the service of a pilot could be deemed an employer for insurance purposes, is not now before us. The difficulty of extending the National Insurance Acts to such intermittent and casual employment, and the impossibility of enforcing the legislation in such case, are obvious.

The point for consideration depends on the special local enactment, and the contractual arrangements in force in Westport. Have the pilots there an exceptional right against the harbour authority, which pilots as a general class do not enjoy? For the reasons already stated, I am of opinion that the answer must be negative. I express no opinion, one way or the other, as to whether, if the board retained part of the pilotage receipts for general harbour purposes, in exercise of their statutory power, that would make the pilots employees. *Wilmerson's Case* (1), as to compensation, cited on behalf of the respondents, was based on there being no pecuniary advantage received by the board. Similarly here the board only acted as receivers for the benefit of the pilots. The case does not apply to pilots who, under the Act of 1906, are made members of the crew. If the shipowner is employer for the purpose of compensation, the harbour authority cannot be deemed for the same purpose of compensation also an employer. There can only be one employer liable for such compensation at the same time. The artificial liability created by the Act of 1906 would suggest that the harbour authority were not regarded as proper subjects of liability.

(1) [1913] 3 K. B. 931.

K. B. Div.
1915.
WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.
Gibson J.

A leading test of insurance liability, at least where employment exists and the controversy is which of two persons is the true employer, is the right of control: *Hill* v. *Beckett* (1); though a person may be employer and liable as such, notwithstanding that supreme control may be vested in someone else: *Annet's Case* (2). Here, however, the pilot, in the discharge of his functions, is not subject to the authority of anybody, either the port board or the ship. No case has been cited at all applicable to such a situation.

Pilots under the Act of 1913 would seem, notwithstanding that under sect. 21 the pilotage receipts are subject to deduction, not to be employees under the pilotage authority. If under the local Act they could be, and were, hired at a wage, and such a hiring could still be legally made, the question might be different. The Scotch case, *Holman* v. *Irvine* (3), noted in the Encyclopædia of English Law, Title "Pilots" (p. 119), is of this type; but there the pilots were not licensed by the pilotage authority. I abstain from any opinion whether licensed pilots could, under existing legislation, be employed on such terms.

Between, however, hiring at a fixed wage, and giving portion only of the specific pilotage receipts to the pilots, there is a distinction. In the former case the remuneration is governed by contract only, and does not depend on the varying and uncertain amount of dues received. Here, however, all takings go to the pilots; the unexercised right of appropriating portion does not change the status of the pilots; and the revocable arrangement between the parties does not convert the pilots into employees under the board and affect their statutory position.

This case, which has been twice argued, is of much importance, not merely because it involves the status of pilots under the Pilotage Acts, but because so many Irish harbours are governed by legislation similar to the Westport Act.

(1) [1915] 1 K. B. 578.
(2) [1914] 2 I. R. 110.
(3) 4 Sess. Ca. 406.

CHERRY L.C.J.:—

The net question for our decision in this case is, whether pilots, who are licensed by a body of harbour commissioners, are "employed" by the latter body, so as to render it liable to pay contributions under the National Insurance Acts, 1911 to 1913.

The first section of the National Insurance Act, 1911, provides that the persons employed within the meaning of that Act are those who are engaged in any of the employments specified in Part I of the first schedule of the Act. This schedule provides that employment within the meaning of Part I of the Act means employment under any contract of service, written or oral, whether express or implied, and whether the employed person is paid by the employer or by some other person.

The amending Act (3 & 4 Geo. 5, c. 37), sect. 6, provides that there shall be added to Part I of the first schedule to the principal Act, which specifies the classes of employment coming within Part I of that Act, the following paragraph:—"Employment under any local or other public authority except such as may be excluded by a special order."

It will be observed that the paragraph says nothing about any contract of *service*, and this omission was strongly relied upon by the Solicitor-General, in his argument on behalf of the Insurance Commissioners, as indicating that persons in the position of pilots, even if not strictly speaking in the "service" of the commissioners, were intended to be brought within the scope of the Act. In the view of the case which I take, however, the omission of any reference to a contract of service in this sub-section is not of much importance, as the real question for determination is whether or not the pilots are in the employment of the harbour commissioners at all.

The answer to this question depends mainly upon the construction to be placed upon the Westport Harbour Act, 1853, and the action of the harbour commissioners under the powers conferred upon them by that Act.

The 23rd section of the Act confers powers upon the commissioners to appoint and license pilots, and from time to time, at their discretion, to remove such pilots and appoint and license

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

Cherry L.C.J.

others in their stead; and the same section confers powers upon the commissioners to charge and recover as and for pilotage rates the sums set forth in Schedule A to the Act.

Section 25 makes it compulsory on the master, owner, or other commander of every vessel entering the port to take on board and employ a pilot licensed as aforesaid. There is no section in the Act directing any remuneration to be paid to the pilots, or in any way earmarking the pilotage fees for the benefit of the pilots; but there is a section dealing generally with all rates, tolls, and duties, received by the commissioners (sect. 38). This section, however, does not directly or indirectly refer to pilots.

Whatever the powers of the commissioners may have been under the Act, the practice for an indefinite duration, extending over at least thirty years, has been that the pilotage rates received by the commissioners were added together, and were distributed quarterly in equal shares among the pilots licensed by the commissioners. The conclusion I have come to on these facts is, that there was no "employment" of the pilots by the commissioners at all, but that they were merely licensed by them, and employed, if employed at all, by the captains of the vessels accepting their services. Whether the commissioners were acting strictly within their statutory powers in acting as they did is to my mind immaterial, the real question being whether there was an actual contract for employment or not, quite apart from the legality of their action.

A number of statutes have been, from time to time, passed by the Legislature, dealing with the position of pilots; and there was considerable discussion before us as to the effect of the provisions contained in these Acts upon the Westport Harbour Act, which is a local and personal one, for it was admitted by both sides that in so far as any provisions of the general Acts were inconsistent with the local Act, the latter must be deemed to be repealed.

I cannot myself see that there is anything in the provisions of the general Acts inconsistent with the provision of the local Act, or rendering illegal the course which was pursued by the Harbour Commissioners in reference to the pilots under their local Act; on the contrary, it appears to me that some of the provisions of the

recent Act (2 & 3 Geo. 5, c. 31), known as the Pilotage Act, 1913, which consolidates the previous Acts, tend rather to confirm my view as to the legality of the action of the Harbour Commissioners under the local Act.

The practice of the commissioners in Westport for at least thirty years has been for the commissioners to treat all pilotage dues levied by them under the powers of their special Act as the property of the pilots themselves; to place them in a common fund, and divide them equally among the pilots licensed in the port. This could only have been done on the assumption that the pilots were directly employed by the masters of the vessels, and that the pilotage dues were the earnings of the pilots themselves. The pooling of these earnings can only be carried out with the consent of all the pilots, and was, until the recent Act of 1913 was passed, of doubtful validity. The 17th section of the Pilotage Act, 1913, provides, however, expressly that a pilotage authority may by bye-laws, made under the Act, provide for the pooling of pilotage dues earned by the licensed pilots, if it appears to the authority to be generally desired by the pilots concerned. This appears to me to confirm in a striking manner the legality of the practice pursued by the Westport Harbour Commissioners, and to show that the pilots, if "employed" at all, are "employed" by the masters of the vessels and not by the pilotage authority.

This view of the relations of the parties under the general law, apart from any local statute, is also confirmed by the 36th section of the same Act, which provides that every licensed pilot when acting as such shall be provided with his licence, and shall, if requested, produce it to any person by whom he is employed, or to whom he offers his services as pilot. The "person by whom he is employed" in this section obviously refers to the master or owner of the vessel, not to the pilotage authority.

If further statutory confirmation were needed as to the legal relation of pilots to the pilotage authority, and to the masters and owners of vessels on which they are employed, respectively, it will be found in the Workmen's Compensation Act, 1906, which, among other provisions, extends the application of the Act to seamen. Subsect. 3 of sect. 7 of that Act provides that the section relating to seamen shall extend to pilots, "as if a pilot when employed on any

K. B. Div. 1915.

WESTPORT PORT AND HARBOUR COMMRS. *v.* IRISH INSURANCE COMMRS.

Cherry L.C.J.

such ship as aforesaid were a seaman and a member of the crew." But for this provision, it is clear that pilots would not be within the provisions of the Workmen's Compensation Act at all.

All these statutory provisions seem to me to confirm the view that the pilots employed under the Westport Harbour Act are not in any sense employed by the Harbour Commissioners, within the meaning of any definition of employment in either of the National Insurance Acts; but that they are merely licensed by them in the same manner as owners of vehicles are licensed to ply for hire in the streets of our cities by the local authorities. This being so, the decision of the magistrates in the present case, convicting the defendants, ought, in my opinion, to be reversed and the summons dismissed.

Solicitor for the appellants: *John Garvey.*
Solicitor for the respondents: *Hugh Horan.*

C. N. K.

K. B. Div. 1915.

June 21.

JOHN PIERCE AND OTHERS *v.* THE WEXFORD PICTURE HOUSE CO., LIMITED (1).

Practice—Company—Winding up—Staying Action against Company in Liquidation—Costs—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 140.

Where, under s. 140 of the Companies (Consolidation) Act, 1908, an application is made by notice of motion to stay an action against a company on the ground that a petition has been presented for its winding up, the plaintiff in the action is entitled to receive from the applicant his costs of appearing in the action.

MOTION to stay proceedings.

This was an application on behalf of Samuel Holmes, a contributory of the defendant company, for an order that all further proceedings in the action be stayed pending the hearing of a petition for the winding up by the Court of the defendant company.

The action was brought to recover the sum of £37 4*s.*10*d.* for rent paid by the plaintiffs for the defendant company, and for

(1) Before PIM J.

breach of contract by the defendant company to keep the plaintiffs indemnified against the payment of said rent.

On the 7th May, 1915, the plaintiffs obtained judgment for this sum of £37 4*s.* 10*d.* and £6 16*s.* costs, and on the 11th June, 1915, an order was made by the Court that the plaintiffs should be at liberty to issue execution for the amount of said judgment. On the 19th day of May, 1915, a petition for the winding up of the company had been presented to the Court by Samuel Holmes, and had been directed to be heard before the Master of the Rolls on the 22nd June, 1915. The present application had been made to Mr. Justice Kenny *ex parte* in the first instance, but he had directed notice to be served on the plaintiffs in the action.

Jvmes Henry, for the applicant:—

The applicant is entitled to the order under section 140 of the Companies (Consolidation) Act, 1908. The practice is to make the order when the petition has been filed, and the application is made in the Court in which the action is pending.

Swayne, for the plaintiffs:—

Having been brought here on this application, the plaintiffs are clearly entitled to their costs. They could not apply to get them in the winding up.

PIM J.:—

Mr. Henry is entitled to carry his motion, but I shall give Mr. Swayne his costs of the motion measured at three guineas. I could not direct Mr. Swayne's client to apply in the winding-up proceedings for his costs.

The Court made the following order:—

"It is ordered that the motion of Samuel Holmes be granted, and accordingly that all further proceedings in this action be stayed pending the hearing of a petition for the winding up by the Court of the defendant company, and it is further ordered that the said Samuel Holmes do pay to the plaintiffs £3 3*s.* for their costs of the motion.

Solicitor for the applicant: *W. A. M'Mullan.*

Solicitors for the plaintiffs: *Huggard & Brennan.*

A. E. C.

K. B. Div. 1915. June 7.

KEEFFE, Appellant; McMAHON, Respondent (1).

Local Government—County Council—Disqualification—Acting when concerned in a Contract with Council—Committee of Agriculture and Technical Instruction—Horse-breeding Scheme—Fees received by member of Council—Local Government (Application of Enactments) Order, 1898, Art. 12 (4e), (6), (11).

A certain number of mares were, after inspection by a judge and veterinary surgeon, paid and appointed by the Department of Agriculture and Technical Instruction, awarded nominations by a County Committee of Agriculture and Technical Instruction under their horse-breeding scheme. These nominations entitled the owners of the mares who received them to free, or partly free, service of their mares by any stallion on the register of the Department. The selection of the particular stallion was left to the owner of the mare. The committee paid a fee of £2 (contributed partly by the Department and partly by local rates) to an owner of a registered stallion for each nominated mare served by his stallion. The respondent, a member of the county council of Queen's County, and of the County Committee of Agriculture and Technical Instruction, was the owner of a registered stallion, and received fees for the service by his stallion of nominated mares.

Held, that the respondent was disqualified for being a member of the county council by reason of being concerned in the contract entered into with a committee of the council.

M., a member of a county council, was present at a meeting of that body during the reading of the minutes of the previous meeting, and took part in a discussion on a matter not on the agenda, namely, a circular drawing attention to the disqualification of members who directly or indirectly derived any financial benefit from certain county schemes. At the close of that discussion M. retired from the meeting, having come to the conclusion that he was not qualified any longer to be a member of the council.

Per Cherry L.C.J., M. had acted as a member of the council.

Case Stated by justices under 20 & 21 Viet. c. 43 :—

At a petty sessions held at Maryborough on the 7th April, 1914, the respondent was charged as defendant in a summons in which the appellant was complainant, with the offence of having acted on the 6th October, 1913, as a member of the county council of

Before Cherry L.C.J., Palles C.B., and Gibson J.

Queen's County, the defendant being at the time disqualified for being a member of the council "by reason of being concerned in a bargain or contract entered into between him and a committee of the said county council, to wit, the Queen's County Committee of Agriculture and Technical Instruction, and of participating in the profit of such bargain or contract."

The facts, as proved, were as follows:—

The defendant was co-opted as a member of the county council of Queen's County on the 13th June, 1911.

On the 6th October, 1913, the defendant attended a meeting of the county council. He was present during the reading of the minutes of the previous meeting, but did not speak or vote. The secretary of the county council could not say whether the defendant was present when the minutes were taken as read.

After the reading of the minutes, the secretary of the county council stated that a circular (addressed to the County Committee of Agriculture and Technical Instruction) had been received from the Department of Agriculture and Technical Instruction; that it was not on the agenda, but that it was so important that he intended to read it. The circular dealt with disqualification for membership of committees appointed under section 14 of the Agriculture and Technical Instruction (Ireland) Act, 1899, and hence for membership of councils appointing such committees, of persons who directly or indirectly derived any financial benefit from the administration of any scheme administered by those committees. Leave was obtained to read the circular after the minutes were taken as read, "and before the proceedings of the council."

A discussion—which the defendant was the first to raise—took place upon the circular. The discussion was as to the position of such members of the council as acted. At the conclusion of the discussion the defendant and some other members left the meeting.

At the annual meeting of the county council held on the 13th June, 1913, it was resolved that the County Committee of Agriculture and Technical Instruction be a committee of the whole council and certain other persons who were then co-opted. The defendant, being a member of the county council, thereupon

K. B. Div. 1915.

KEEFFE v. McMAHON.

became a member of the committee. The committee held office until June, 1914, and the defendant had, before the date of the prosecution, retired therefrom.

The case stated further set out that: "An annual show of mares is held by the County Committee of Agriculture and Technical Instruction, under their horse-breeding scheme, for the award of mare nominations. The mares exhibited at the shows are inspected by a judge and veterinary surgeon, paid and appointed by the Department of Agriculture and Technical Instruction. The said committee select from those exhibited a certain number of eligible mares, to which they award nominations. These nominations entitle the owners of the mares who receive them to free, or partly free, service of their mares by any stallion on the register of the Department, which includes stallions in every county in Ireland. The selection of the particular stallion is left to the owner of the mare. Mr. McMahon had at least three stallions on the register of stallions for 1913. Two paying orders were produced, issued by the Queen's County Committee of Agriculture and Technical Instruction to the defendant in payment of services of his registered stallion, one dated 2nd October, 1912, for £116 for services during the season 1912; the other dated 10th September, 1913, for £86 for services during the season 1913. The committee pay £2 (contributed partly by the Department and partly by local rates) to an owner of a registered stallion for each nominated mare served by his stallion. The last date when mares might be served would be July. There is no service of mares in the month of October.

"The Court held that, in the premises, the defendant was not concerned in any bargain or contract entered into with the committee of which he was a member, and that he did not participate in the profit of any such bargain or contract, and accordingly we dismissed the case. And the opinion of the Court is sought as to whether we were right in so holding and dismissing said complaint."

J. O'Byrne, for the appellant:—

Inasmuch as the defendant was present at the reading of the minutes of the previous meeting, and took part in the discussion

on the circular from the Department of Agriculture and Technical Instruction, he clearly acted as a member of the county council on October 6th, 1913. It is not necessary that he should have voted. As to what constitutes "acting as a member," assistance may be derived from cases relating to disqualified justices of the peace. A justice who is disqualified should not remain on the bench, or hold any conversation with any member of the Court: *Ex parte Clarke* (1); *R.* v. *Suffolk Justices* (2); *The Queen* v. *London County Council* (3).

The real question is whether the defendant was concerned in a bargain or contract with a committee of the county council. In principle there is no distinction whatever between this case and *Keeffe* v. *Shaughnessy* (4). The fees paid to the defendant were provided partly by the Department and partly out of local rates; the county committee has to vouch the amount payable, and send the voucher to the Department.

Swayne (with him *Blood K.C.*), for the respondent:—

There was no contract between the defendant and the committee. In *Keeffe* v. *Shaughnessy* (4) the defendant received a benefit under the cattle-breeding scheme; but there is an essential difference in the mode of administering horse-breeding and cattle-breeding schemes. In the horse-breeding scheme the Department does everything, merely utilizing the local committee as a clerical staff for recording the number of nominations and services. The scheme in this case is not confined to Queen's County; the owner of a nominated mare in any other county would be entitled to the service of his mare by the defendant's stallion. The person who receives the benefit is the owner of the mare; and if there is any contract in this case, it is between the owner of the mare and the defendant.

No proof has been given that the defendant acted as a member of the county council on the 6th October, 1913. The circular from the Department was not on the agenda, and after it had been discussed, and before the business of the council was taken up, the

(1) 26 L. R. Ir. 1.
(2) 18 Q. B. 416.
(3) [1892] 1 Q. B. 190.
(4) [1915] 2 I. R. 105.

K. B. Div. 1915. KEEFFE v. MCMAHON.

defendant retired from the meeting. In fact, the circular in no way related to the business of the council; and it was actually addressed to the Committee of Agriculture and Technical Instruction.

O'Byrne was not called upon in reply.

CHERRY L.C.J.:—

In this case the defendant was charged before the justices with the offence of having acted as a member of the county council of Queen's County at a time when he was disqualified from so acting "by reason of being concerned in a bargain or contract entered into between him and a committee of the said county council, to wit, the Queen's County Committee of Agriculture and Technical Instruction, and of participating in the profit of such bargain or contract." The circumstances are very short, and are stated fully in the case. There is in Queen's County, as in every other county in Ireland, a County Committee of Agriculture and Technical Instruction appointed under the Agriculture and Technical Instruction (Ireland) Act, 1899. This committee holds an annual show of mares under the horse-breeding scheme of the Department of Agriculture and Technical Instruction; the mares exhibited at the show are inspected by judges and veterinary surgeons paid and appointed by the Department.

The case states that the committee selects from the animals so exhibited a certain number of eligible mares to which they award nominations. There is some dispute as to the accuracy of that statement, and it has been represented that, as a matter of fact, the selections are made not by the committee, but by the officers of the Department. However, we are bound by the case, and we must proceed on the assumption that the selection rests, not with the Department but with the Agricultural Committee. These nominations entitle the owners of the mares who receive them to the free or partly free service of the mares by any stallion on the register of the Department. The Department, on the certificate of the county council, pays £2 for the service of each mare. The owner of the stallion may charge more, but only

£2 is paid by the Department, and that £2 is contributed partly by the Department and partly by the county council. The selection of the particular stallion is left to the owner of the mare, but he must select from the register approved by the Department.

Mr. McMahon was the owner of a stallion which he had procured to be registered; and the only point open to us is: Was there or was there not any contract with the county council for the service of mares by his stallion at the time he sat and acted as a member of the county council? It has been said that the contract was one only between him and the owner of the mare. That is not, in my view of the facts, the true legal aspect of the case. It appears to me that this was a four-part contract; that the committee, the Department, the owner of the mare, and the owner of the stallion, were all parties to this composite arrangement, and that each of them received some gain or consideration. Both the owner of the mare and the owner of the stallion benefited by the arrangement, which was paid for partly by the Department and partly by the county council.

In these circumstances it is clear that there was a contract between the defendant and the committee. The words of Article 12 (4) (*e*) of the Application of Enactments Order, 1898, would apply if he participated in the profit of any bargain or contract entered into with the council or committee. We are of opinion that a contract was entered into between the defendant and the committee, and that the decision of the magistrates was erroneous in point of law, and should be reversed.

Another point was raised by Mr. Swayne, but I do not think it is open to the parties on the case stated, namely, whether the defendant acted as a member of the county council on the date in question. It appears that he was not only present at the meeting of the council on the 6th October when the minutes of the previous meeting were read, but that he joined in the discussion which took place on the circular of the Department drawing attention to the fact that it was not lawful for members of a county committee of agriculture to derive any financial benefit from the operations of any scheme administered by the committee. At the close of the discussion the defendant came to the conclusion that he was not qualified any longer to be a member, and the question is

K. B. Div. 1915.

KEEFFE v. MCMAHON.

Cherry L.C.J.

whether, in these circumstances, he acted as a member of the council. To my mind he was acting as a member, and if the question was open—which I do not think it is on the case stated—I should decide that point also against the defendant.

The case must be remitted to the justices with a direction that their finding in point of law was erroneous; that the defendant was concerned in a bargain or contract entered into with the committee; that he participated in the profit of such bargain or contract, and that they should proceed to determine the case according to law. We give no costs against the defendant, as we do not think that he knowingly violated the law.

PALLES C.B., and GIBSON J., concurred.

Solicitor for the appellant: *P. J. Byrne.*
Solicitor for the respondent: *W. X. White.*

C. L.

BELFAST COUNTY COUNCIL, APPELLANTS; THE COMMISSIONER OF VALUATION AND THE MIDLAND RAILWAY COMPANY (NORTHERN COUNTIES COMMITTEE), RESPONDENTS (1).

K. B. Div. 1914.

June 10, 11, 12.

Appeal.

Oct. 30.

Nov. 2, 3, 18.

Rateable Hereditaments—Valuation—Appeal—Several Tenements in Occupation of Same Owner—Appeal as to Valuations of some of Tenements—Cause of Appeal such as to require Alteration in Valuation of Tenement as to which no Appeal—Necessity of appealing as to such Valuation also—Valuation (Ireland) Act, 1852 (15 & 16 *Vict. c.* 63), *s.* 22—*Valuation (Ireland) Act*, 1864 (27 & 28 *Vict. c.* 52), *s.* 1.

Sect. 22 of the Valuation (Ireland) Act, 1852, gives a right of appeal to quarter sessions to any person aggrieved by the revised valuation of any tenement or tenements made by the Commissioner of Valuation, and provides that "if the cause of appeal shall be such as to require alteration to be made in the valuation of any tenement for which any other person or persons is, or are, liable to be rated, the appellant shall give like notice to such other person or persons, who shall, if he or they so desire, be heard upon such appeal . . ." A similar right of appeal is, by sect. 1 of the Valuation (Ireland) Act, 1864, as amended by article 37 of the Adaptation of Irish Enactments Order, 1899, given to councils of counties and urban districts, with the sanction of the poor law commissioners, such appeal to be "subject to the same conditions and provisions, and exercised in the same manner," as provided for in respect of appeals by owners and occupiers.

The Commissioner of Valuation having divided premises in the occupation of the Midland Railway Co. into certain different items, (*a*), (*b*), and (*c*), upon which items he placed separate valuations, appeals to quarter sessions were served by the Belfast County Council in respect of the valuations placed upon items (*a*) and (*b*), no appeal being served in respect of (*c*). Portion of the subject-matter of valuation comprised in item (*c*) was also included in item (*b*). The Recorder, on the hearing of the appeals, was of opinion that he was bound to determine what subject-matters were legally included in the description of tenements in the valuation list in respect of which appeals had been brought, and to value the same without making any deduction in respect of any subject-matter comprised in item (*c*), but consented to state a case for the opinion of the King's Bench Division.

Held, by the King's Bench Division (Palles C.B., and Gibson J.), that it was competent for the Belfast County Council to serve a notice of appeal in

(1) In the King's Bench Division, before PALLES C.B., and GIBSON J.

K. B. Div. 1914.

BELFAST CO. COUNCIL v. COMMR. OF VALUATION.

respect of item (*b*) without also serving a notice of appeal in respect of item (*c*); but that the Recorder, in arriving at the valuation of item (*b*), was bound to make a deduction in respect of any subject-matter comprised in item (*c*).

Held, by the Court of Appeal, that, in the circumstances of the case, the cause of appeal in respect of item (*b*) was such as to require alteration to be made in the valuation of item (*c*) within sect. 22 of the Valuation Act of 1852, and that it was not competent for the Belfast County Council to serve a notice of appeal in respect of item (*b*) without also serving a notice of appeal in respect of item (*c*), notwithstanding that the tenements comprised in each were in the occupation of the same owners.

CASE STATED by the Recorder of Belfast under section 10 of the Valuation of Rateable Property (Ireland) Act, 1860 (22 Vict. c. 4).

On the 14th December, 1912, the council of the county borough of Belfast appealed to the general sessions of the Peace and Court of Record for the county of the city of Belfast against the valuations of certain tenements and premises in the occupation of the Midland Railway Company (Northern Counties Committee), on the grounds that the said valuations were under-estimated and insufficient; that the basis on which the said valuations were made was incorrect and inequitable; and that the same were not made in accordance with the provisions and requirements of the statutes in that case made and provided.

Appeals were served in respect of the following items:—(1) A valuation of £996 10*s.* placed on tenements described as "railway 596 lineal perches." (2) A valuation of £399 10*s.* placed on tenements described as "railway 239 lineal perches." (3) A valuation of £4258 placed on tenements described as "station building, offices, cab-rank, stores, sheds," etc.; and (4) a valuation of £47 placed on tenements described as "Greencastle railway station buildings, subway and advertising spaces, platform, signal cabin, and apparatus and approaches."

No appeal was lodged in respect of a valuation of £1317 placed on certain subject-matters, some of which were in fact, as found by the Recorder of Belfast, included in the valuation of £399 10*s.*

The case stated by the Recorder of Belfast on the hearing of the appeals set out as follows:—

"1. In compliance with the notice set out in the first schedule

hereto (1), I state the following case for the opinion thereon of the King's Bench Division of the High Court of Justice in Ireland, pursuant to the provisions of sect. 10 of the Valuation of Rateable Property (Ireland) Act, 1860 (23 Vict. c. 4).

"2. The hearing of arguments and taking of evidence connected with the two appeals referred to in the above notice (which by consent were heard together) occupied three days; and the print of the shorthand writer's note (which was taken by consent of the parties) covers some 150 pages; but it seems to me to be possible to state the required case fairly and sufficiently without referring to the arguments or evidence further than is hereinafter set forth. The print can, of course, be made available if the Court so desire.

"3. I refer to the copy of an extract from the Valuation List of the Commissioner of Valuation, set out in the second schedule hereto. The valuations of £399 10*s.* and £996 10*s.* in said extract are the valuations which were the subject of the said appeals, while the valuations of £4,258 and £47 were also the subject of other appeals pending in Court at the same time, but adjourned at the request of all parties to await the decision of the House of Lords in the *Lancashire and Yorkshire Railway Company* v. *Liverpool Corporation* (2).

"4. The valuation of £1317 in said extract is the valuation of that amount mentioned in the said notice. It was not the subject of appeal by any party.

"5. I have set out in the third schedule hereto copies of the notices of appeal served by the Belfast County Council and the Midland Railway Company (Northern Counties Committee) respectively, as to each of the four valuations mentioned above.

"6. By an arrangement come to between all the parties as the most convenient, Mr. Harrison, K.C., opened for the railway company in the said two appeals (though the said company were the respondents), and raised in substance, though not exactly in form, the same contentions as are set out in the said notice (3).

"7. I received no certain information from the Commissioner of

(1) This notice was based on the grounds set out *infra*, p. 323.

(2) Since decided, and now reported [1915] A. C. 152.

(3) See *infra*, p. 323.

K. B. Div. 1914.

BELFAST CO. COUNCIL v. COMMR. OF VALUATION.

Valuation, or anyone else, as to why the Commissioner made three separate valuations of £399 10*s.*, £996 10*s.*, and £1317. It was suggested by Mr. Harrison that it was due to the fact that when the commissioner originally valued these premises part was within the old city of Belfast and part within the county of Antrim, and that the separate valuations were continued after the city boundary was extended. It may be that the requirement in section 17 of the Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), to 'prepare and make out a list or table of the several hereditaments and tenements contained in each townland or other denomination therein' is the true reason that the valuations of £399 10*s.* and £996 10*s.* appeared separately. I cannot accept the responsibility for the indefinite position in which this matter is left if anything turns upon it.

"8. As to the first question of law raised by the said notice, I gave no decision as to whether the Commissioner of Valuation was right or wrong in making three separate valuations rather than one joint valuation, and in any case I decided that I had no power to alter or amend or amalgamate the 'description of tenements' in his valuation list, and that my sole duty was with reference to the notices of appeal served, and to 'hear and determine the matter of such appeal as stated in such notice of appeal, but not any other cause or matter of appeal' (section 23 of the Valuation (Ireland) Act, 1852), and that I was bound to do so.

"9. With regard to the second question of law raised by said notice, I decided that it was my duty to determine what subject-matters were legally included in the 'description of tenement' in the valuation list, and, having so determined, to value same according to law, and that my duty and jurisdiction then ended as regards the appeals before me, and that if, as Mr. Harrison contended, certain subject-matters would be included in my valuation which were already included in the valuation of £1317, yet I had no jurisdiction to go into that, or make a deduction from my valuation in respect of it; and that any such matter could and should have been raised by the company by serving a notice of appeal in respect of the £1317 valuation, and that the hardship was one which I had no jurisdiction to cure.

"10. At a later stage of the hearing I admitted evidence on

pressure of Mr. Harrison, but subject to the objection of Mr. Wilson K.C. (which objection I had then thought, and still think, was well founded), which went to show, and did in fact show, that some of the subject-matters included in my valuation were in fact included in the valuation of £1317.

"11. This second question of law has no reference to or bearing upon the valuation of £996 10*s*., but only upon the valuation of £399 10*s*., as the subject-matters of the £1317 valuation alleged to be included in my valuation all lay within the area of the £399 10*s*. valuation.

"12. The third question of law set out in said notice appears to be the same as the second, except in the matter of wording.

"The questions for the opinion of the Court are:—

"(1) Was it competent for the appellants to serve their notices of appeal as to the valuations of £399 10*s*. and £996 10*s*. without also serving a notice of appeal as to the £1317 valuation; and, was it competent for me to hear the notices of appeal so served?

"(2) Had I any jurisdiction, and, if so, was I bound to use it after I had determined the subject-matters of the appeal as to the £399 10*s*. valuation, and my valuation of the same, to proceed to inquire whether the valuation of £1317 covered some portion of such first-mentioned subject-matters, and further, to make a deduction from my valuation in respect thereof?"

The notice served by the respondents, the Midland Railway Company, requiring a case stated, was based upon the following grounds:—

1. That the said appeals are incompetent, because the appellants cannot select the two items of valuation of the railway of the said respondents in the city of Belfast, against which they have appealed, viz., the item of 239 lineal perches valued at £399 10*s*., and the item of 596 lineal perches valued at £996 10*s*., and appeal against them without at the same time appealing against other items of valuation in the said city, which include hereditaments in the occupation of these respondents valued as railway, viz., the item of No. 29 York Street, valued at £1317; that the Commissioner of Valuation should have brought out in his list a

K. B. Div. 1914.

BELFAST CO. COUNCIL v. COMMR. OF VALUATION.

total valuation of all items in this area properly valued as railway, and that the Commissioner of Valuation not having done so, it is not competent for the appellants to appeal against part only of what is valued as railway without appealing also against the other items listed by the Commissioner of Valuation as railway.

2. That in giving the valuations of the items of 239 lineal perches and 596 lineal perches the Court was bound to deduct from the figures arrived at the appropriate amount of the valuation of the running lines and sidings included as separate items by the Commissioner of Valuation, in the before-mentioned valuation of £1317, so as to avoid valuing twice over under different heads the same portion of the railway.

3. That it having been proved that the figures given by the Corporation valuers as the valuation of the respondent's railway necessarily included matters referable to items of railway included under items in the Commissioner's lists not appealed against, viz., items in the before-mentioned valuation of £1317, the Court was bound to make a deduction of the amounts properly attributable to these items so included and not appealed against.

Henry K.C., *Harrison K.C.*, and *J. H. Robb*, for the Midland Railway Company.

Ronan K.C., *D. M. Wilson K.C.* and *Thomas Harrison*, for the Belfast County Council.

McElligott K.C. and *J. Fitzgerald*, for the Commissioner of Valuation.

The arguments were similar to those in the Court of Appeal, reported *infra*, p. 328.

PALLES C.B.:—

We do not think it is necessary to allow this case to stand for the purpose of considering our judgment. It comes before us on a case stated by the learned Recorder of Belfast on an appeal by the Midland Railway Company from Sir John Barton's valuation of the portion of the railway in the city of Belfast. Sir John Barton divided so much of the Midland Railway as is situate in the city of Belfast into three portions, and valued each separately, treating

each of them as a separate rateable hereditament. I only say in reference to that, that, in my opinion, it would have been competent for Sir John Barton to have valued the portion of the railway situate in the city of Belfast as one rateable hereditament under the word "railway" in sect. 12 of the Valuation Act. He has not adopted that course, and we must only, as well as we can, see that no injustice has been caused by his separating into several this one rateable hereditament. I do not wish to say that it was absolutely wrong, or that upon a certain course having been taken it might not, and ought not, to have been set right by the learned Recorder of Belfast. I should require more argument than I have heard yet to convince me that if an appeal had been taken from the description of these three hereditaments which ought to be valued as one, that appeal ought not to have succeeded. But I pass from that; I mention it merely for the purpose of preventing this decision being relied upon hereafter as expressing approval of this mode of valuing property of this description. Having regard, however, to what has taken place, these must now be treated as separate hereditaments, and dealt with accordingly. It is well known that several methods of valuing railways have from time to time been adopted, and from time to time dealt with by the mass of cases in England upon the subject. One of the methods is called, I think, the train-mile method, and another is called the parochial system. Now, if the train-mile system is adopted, it involves, or it might involve, that the sidings are dealt with in a way different from that in which they are dealt with by the parochial system, and that is one of the difficulties that arise in valuing in parts as Sir John Barton has done. If a railway is, as here, valued in parts, and if the Recorder differs (as he has a right to differ) from the system adopted by Sir John Barton, and if the parts into which the Recorder divides the railway are not identical with those into which Sir John Barton divided it, difficulties may occur, and, in this case, have occurred. The cardinal fact in this case is, that it appears from the statement of the case that what is included in one item of Sir John Barton's valuation as an item not appealed from, is also now included in another item of the valuation *as amended by the learned Recorder of Belfast*, and, in my opinion, it is impossible

K. B. Div. 1914.

BELFAST Co. COUNCIL *v.* COMMR. OF VALUATION.

Palles C.B.

that that can be right. It may be from want of sufficient jurisdiction to correct unappealed-from items; it may be that the error cannot be put right; but undoubtedly it is an injustice, and the question we have to determine is, whether in point of law the injustice can be obviated. In the present case, of the three items which together represent the valuation of this railway, one item has not been appealed from. There have been appeals from the two other items. The learned Recorder has come to a conclusion which includes, in his valuation of the two items appealed from, part of what is included in the item that has not been appealed from. That has been met by the contention of the Corporation of Belfast that not only the unappealed-from item cannot be interfered with or touched by the learned Recorder, which I fully admit, but that the Recorder is debarred from inquiring into what was the subject-matter of this unappealed-from item. Now, with great respect I differ from that. I have in the unappealed-from item the expression "sidings." That expression is ambiguous, and may mean all the sidings or some only of the sidings. The Recorder has included, as I have said, in his valuation of the appealed-from items, something in reference to such other sidings as are called by Mr. Wilson alternative main-line tracks.

First, it is necessary, in considering the items that the learned Recorder has considered for himself, to see what he includes in the appealed-from items. I do not see how that can be done, unless he also ascertains what is included in the items which are unappealed from; but really it is not necessary, because when it has been proved, as it has been, that all the sidings are included in the unappealed-from item, it necessarily follows, in my opinion, that no sidings ought to be included in the appealed-from items, and if that is so, I am of opinion that the learned Recorder can, and ought to, alter the tenement in reference to which the appeal was taken, by excluding from it anything contained in the unappealed-from item. It is proved by the evidence before us that the £399 10*s.* item does not include any part of the sidings. The learned Recorder, on an appeal from that item, altered the subject-matter of the hereditament to be valued, and introduced into it something connected with the sidings. I am of opinion

that when the valuation of the railway had been divided into items of this description, the first thing for the Recorder to ascertain was, what was the subject-matter of each thing that was treated as a separate tenement.

The questions submitted by the learned Recorder for the opinion of the Court are as follows: [His Lordship read the questions as set out in the case stated.] I have no doubt that it was competent for the appellants to serve notice of appeal as to the valuation of £399 10*s.* and £996 10*s*, without serving notice of appeal as to the £1317 valuation, and that the Recorder was bound to hear this appeal, because, having regard to the shape in which this valuation was prepared by Sir John Barton, I hold that the Corporation was entitled to treat these as separate tenements. I am of opinion that the learned Recorder had jurisdiction, and jurisdiction which he was bound to exercise, not after he had determined the subject-matter, but in determining the subject-matter, of the £399 10*s.* valuation, to see what it included, and if it included items already valued, to make a deduction in respect of them.

GIBSON J.:—

At first I was inclined to hold, on Mr. Wilson's argument, that the first tenement, that relating (*inter alia*) to sidings, not having been the subject of appeal, and not being before the Court, our function was confined to considering the legal effect of the description of the second tenement taken by itself. On consideration I agree with my Lord's view. The tenements possibly should have been described and valued as one integer, and not as separate units. But in the present list, as framed, we must take it that there are three distinct tenements, each professing and intended to be complete and to exclude the others; the description of tenement 1 and tenement 2, the composition of the same author, must, as far as possible, be so read. What were the subject-matter and contents of "sidings" in tenement 1, and of "railway" in tenement 2? It is clear that "sidings" in number one should exclude, prima facie, such sidings from being included in "railways" in number two. Tenement 2 means "railway," exclusive of all sidings in number one. Had the description of tenement 2 been

K. B. Div. 1914.

BELFAST Co. COUNCIL v. COMMR. OF VALUATION.

Gibson J.

such that it could only be legally satisfied by including the sidings now in question, there might be difficulty. But there is no precise description of either the "sidings" or the "railway," and it is familiar law that parol evidence is admissible to explain the subject-matter to which general language is addressed. It is, therefore, competent to establish by parol that "sidings" in tenement 1 included the sidings now sought to be included in "railway," and that "railway" did not comprehend such sidings. The Recorder is not to make a deduction from tenement 2, but to value tenement 2 as exclusive of sidings already accounted for in tenement 1.

A. E. C.

Appeal.

The Belfast County Council appealed (1).

Ronan K.C. and *Gordon K.C.* (with them *T. Harrison*), for the appellants:—

The King's Bench Division has rightly held that the Recorder of Belfast had no jurisdiction to deal with or alter the valuation of £1317 in respect of which no appeal was lodged by either side, but they have further held that the Recorder, having arrived at the proper valuation of the tenements in respect of which appeals were lodged, ought then to alter that valuation by excluding from it anything contained in the unappealed-from item. We submit that he had no power to do so. He is not to arrive at an incorrect valuation. It is clear that the Recorder could not touch the £1317 valuation, as it was not appealed from: see judgment of Palles C.B. in *Whaley* v. *The Great Northern Railway Co.* (2). This was admitted in the Court below. But once it is also admitted, as it was by Palles C.B., that the three items "must now be treated as separate hereditaments and dealt with accordingly," it follows that the Recorder's only duty was to value the items before him, without making the suggested deduction. If "sidings" are included in the £399 10*s.* valuation, they must be valued, even though included in the £1317 valuation: see judgment of Holmes L.J. in *Whaley's Case* (3), where he says:—"The

(1) In the Court of Appeal before O'BRIEN L.C., and HOLMES and MORIARTY L.JJ.

(2) [1913] 2 I. R. 142, at p. 167. (3) *Ib.*, at p. 180.

description of the premises and the valuation appearing in the signed lists, if not appealed from, are equally final and conclusive." Under section 23 of the Valuation (Ireland) Act, 1852, the Recorder was empowered and required to hear and determine the matter of the appeal before him as stated in the notice of the appeal, "but not any other cause or matter of appeal." He is, in effect, by the order of the King's Bench Division, required to determine another cause of appeal. If the railway company are injured, our answer is that they should have lodged an appeal in respect of the £1317 valuation. It was open to them to have done so as aggrieved parties, but they have elected to lie by. It cannot be said that, because "sidings" are improperly included in an unappealed-from item of valuation, they should be excluded from the item in which they are properly included. The provision in section 22 of the Valuation (Ireland) Act, 1852, that if the appeal affects the valuation of other tenements, the appellant shall give notice to the other person or persons affected, refers to the case of tenements in the occupation of third parties. Here the railway company were in possession of all the tenements in respect of which the three valuations were made.

Henry K.C. and *Harrison K.C.* (with them *J. H. Robb*), for the respondents:—

The effect of the decisions in *Moore* v. *Boyd* (1) and *Whaley's Case* (2) is that the finding of the Commissioner of Valuation as to the item of £1317, no appeal having been lodged in respect of it, is final and conclusive, both as regards the amount of the valuation, and the description of the premises. His finding that the £1317 item consists of sidings, turntables, &c., is a judgment *in rem*, and no part of the tenements comprised in that valuation can be carried over into another item and dealt with as part of it. We admit that the three items in question must be treated as separate tenements; but we also say that these, for rating purposes, must be mutually exclusive, and that there cannot be inter-locked tenements, nor can a person or corporation be rated twice over in respect of the same premises. The right of appeal given by

(1) [1911] 2 I. R. 579. (2) [1913] 2 I. R. 142.

Appeal. 1914.

BELFAST CO. COUNCIL *v.* COMMR. OF VALUATION.

sect. 22 of the Valuation (Ireland) Act, 1852, was confined to persons aggrieved by the valuations contained in the Commissioner of Valuation's lists; if the appeal of such a person affects the valuation of other tenements, it is necessary for him, under sect. 22, to give notice to such other person or persons as are liable to be rated for such other tenements, who have the right to be heard upon such appeal. Power to appeal from the revised valuation of tenements was first given to councils of counties and urban districts by sect. 1 of the Valuation (Ireland) Act, 1864, as amended by article 37 of the Adaptation of Irish Enactments Order, 1899; but such appeal was expressly made subject "to the same conditions and provisions" as provided for in respect of appeals by owners and occupiers of rated tenements. We submit, accordingly, that notice of appeal should have been served by the Corporation of Belfast in respect of the £1317 item, and that the first question in the case should be answered in the negative. The second question would not then arise. If the Court be against us as to this, we say that the second question should either be answered in the affirmative, or that the Court should make a declaration that it was not competent for the Recorder to include in his valuation of the £399 10*s.* item anything already included in the valuation of the £1317 item. Otherwise the respondents will be rated twice over in respect of the same tenements.

McElligott K.C. and *J. FitzGerald* for the Commissioner of Valuation.

Ronan K.C., in reply.

Cur. adv. vult.

Nov. 18.

O'BRIEN L.C.:—

The Lord Chief Baron, in giving his judgment in the Court below, observes:—"The cardinal fact in this case is, that it appears from the statement of the case that what is included in one item of Sir John Barton's valuation as an item not appealed from, is also now included in another item of the valuation *as amended by the learned Recorder of Belfast*, and in my opinion it is impossible that that can be right." It was not suggested on behalf of the appellants that it could, as a matter

of justice, be right, but it was contended that there was no remedy.

Having had the advantage of, I think, a more minute examination of the sections, by counsel on both sides, than took place in the Court below, I have come clearly to the opinion that no great difficulty exists in making law and justice coincide. I assume that the two "items," as the Lord Chief Baron calls them, of £1317 and £399 10*s.*, must be really treated as two separate and independent valuations of rateable hereditaments, each of which could be the subject of appeal. I am not at all sure that this is necessarily so, but the Court below formed a clear view on this point, and as it is unnecessary in the view I take to decide it, I express no opinion on this branch of the case.

In the conclusion I have come to, the questions which were put by the learned Recorder of Belfast should not be answered, as to the first, in the same way as the Divisional Court has answered; and I do not think that No. 2 arises. My opinion turns entirely upon the construction which I think must be given to sects. 18–23 of the Valuation (Ireland) Act, 1852, and the Valuation (Ireland) Act, 1864.

So long as the Act of 1852 was in force the rating authority had no right to appeal from the valuation, this right being restricted to persons, other than the rating authority, who were aggrieved.

The scheme of the Act contemplated, first a notice setting forth the grounds of the grievance, which is to be forwarded to the Commissioner of Valuation through the secretary or clerk of the rating authority (sect. 19). The Commissioner of Valuation must not only consider the particular grievance set out in the notice, but if he has in his lists tenements or rateable hereditaments similarly circumstanced, he must amend the valuations or statements of area of such tenements or hereditaments "in order to render the valuation of every tenement or hereditament comprised in such list proportionate and uniform" (sect. 20).

It is of course manifest that many cases would arise, when an appeal was taken in respect of one rateable hereditament comprised in the lists settled by the commissioner, in which an

Appeal. 1914.

BELFAST Co. COUNCIL v. COMMR. OF VALUATION.

O'Brien L.C.

alteration of the valuation or description of this rateable hereditament by the appellate authority might affect some other rateable hereditament.

To prevent injustice being done in such cases, it is provided by sect. 22 that "if the cause of appeal shall be such as to require alteration to be made in the valuation of any tenement for which any other person or persons is or are liable to be rated, the appellants shall give like notice to such other person or persons, who shall, if he or they so desire, be heard upon such appeal"; and by sect. 23 the Court is bound to hear all parties who may directly or indirectly be interested in the cause of such appeal, and to make such order thereon as to such parties as seems fit, and to award costs.

Now, the like notice to be given to such other person or persons is not, in my judgment, a mere copy of the notice of appeal given to one of those interested in the valuation. It must either itself be a notice of appeal, or have the same effect as a notice of appeal, because otherwise the Court could not, under section 23, make an order, final and conclusive, binding on all parties, which would have what appears to me to be the fundamental object of the whole system, namely, a proportionate and uniform valuation of every tenement or hereditament comprised in the valuation list; and if this like notice is not given, the result must be that an irregularity has arisen in procedure which justly and properly deprives the county court judge of the right of hearing the complaint in respect of the tenement which he is asked to value, but which cannot be justly or properly valued without considering the circumstances of some other tenement in the list.

So long as only the person owning or interested in the rateable hereditament was the person to appeal, no difficulty could arise if his appeal affected another hereditament also in his possession. Not only did he not come within the words of the section, but it was clearly his own business to decide whether the appeal should be taken in respect of one hereditament or both, so that no principle of justice was violated if he was guilty of forgetfulness with regard to the necessity of revising more valuations of property in his own possession than one.

Coming now to the Valuation Act, 1864, this for the first time gave to the rating authority the same power of appeal as the

owner or occupier of a tenement had. A different class of case at once came into existence. A person might be owner of several rateable hereditaments so connected that it would be impossible in justice to vary the valuation of one without varying the valuation of the others; and the present case, on the assumption that I have made at the outset that these items must be treated as separate hereditaments, is a case in point.

Taking the view he did of the law, the Recorder states that when he increased the valuation of the railway line to £659 3*s.* 6*d.*, to use his own words, there were included in that valuation subject-matters which were in fact included in the valuation of £1317.

If the appellants be right in this case, the railway company, who are owners of both tenements, are deprived of a remedy, by the simple expedient of the service of notice of appeal by the rating authority at the latest possible moment, for no one could rationally suggest that the railway company could have a power of divination which would make it incumbent on them themselves to serve a notice of appeal in advance in respect of the other valuation, with which they were possibly not dissatisfied so long as the whole scheme of valuation was left untouched.

It is not a wild assumption that the amending Act was not intended deliberately to work an injustice, as it would if the appellants' contention is correct. Now the power of appeal is to be the *same* power of appeal as the owner "then had"; it is to be subject to the same *conditions* and *provisions*, and exercised in the same manner as provided before 1864 in respect of appeals of owners and occupiers. Now the provisions of section 22 gave a power of appeal, but so limited that that power could not be made effectual unless there was also brought before the Court, by service of notice, the person who was owner of another tenement which would be affected by any alteration made in the valuation of the tenement in respect of which the power of appeal was exercised.

This notice, while of course directed to a person, was for the purpose of bringing before the Court certain subject-matters, namely, "valuations" of other tenements which might require alteration by reason of the service of the notice of appeal.

Accordingly, if the same "*conditions* and *provisions*" are to exist and be exercised *in the same manner* as is provided for in

Appeal. 1914.

BELFAST CO. COUNCIL v. COMMR. OF VALUATION.

O'Brien L.C.

respect of appeals by owners, the only way by which the purpose of the statute can be effected is by requiring that the notice of appeal as to a valuation shall be so framed as to bring before the Court the other valuations which might be affected or ought to be altered, if that appeal is to be disposed of so as not to work injustice, and that this must be done whether the tenements are the property of one or several owners.

In other words, if there is to be an effective appeal at all, there must be also an appeal in respect of other valuations which may require alteration, if the intention of the statute is to be given effect to.

Although this brings into section 22 what may not be literally within it, it is the only construction which can give any effective operation to the plain and expressed intention of the Act of 1852, and the plain and expressed intention of the Act of 1864, as to the scheme of revision and appeal, in respect of what might be called interdependent valuations.

The appellants in this case insist that they have the right to appeal with regard to what I assume to be one rateable hereditament, and to have an adjudication on the appeal without considering or determining the position of the valuation of other rateable hereditaments which are so interwoven with the hereditament, the subject-matter of the appeal, that one cannot rationally be dissociated from or considered apart from the other. This, in my opinion, they cannot do, and as the notice of appeal is framed, and well framed, with that object, in that sense I consider it to be a bad notice of appeal, and that it did not give the learned Recorder jurisdiction to entertain any question of alteration of the valuation with respect to the £399 10s. tenement, without the other tenement being before him.

A question has been raised at the Bar as to whether when, in a case before 1864, the notice required by section 22 is served, the Court has before it one appeal or two appeals. It appears to me that, whatever you call it, it must of necessity give to the Court jurisdiction to deal with both valuations, otherwise the Court could not deal in the manner contemplated by the Act with either of them, or give any effective decision at all; and it appears to me that the case of the appeal by the rating authority must in all respects be placed on the same basis. I am, accordingly, of opinion that the first question must be answered in the negative; that the

second question does not arise at all; and that the proposed answer by the King's Bench Division being unnecessary, should be deleted, the answer to the first determining the whole question. Of course, if the Court below had taken the same view which I do, this would have been of necessity the result. The order should be varied, in my opinion, by discharging the whole of the answer, including the recital; by answering only the first question in the negative; by not answering the second; and by declaring that the respondents should have the costs of the hearing in the Court below and of this appeal.

HOLMES L.J. concurred.

MORIARTY L.J.:—

The questions stated by the learned Recorder for the opinion of the Court are as follows. [His lordship read the questions.]

Now the difficulties in this case have arisen from two matters—first, from the fact that the Commissioner of Valuation, Sir John Barton, divided so much of the Midland Railway as is situate in the city of Belfast into three portions, and valued each separately, treating each of them as a separate rateable hereditament. It would have been more convenient if he had valued the portion of the railway situate in the city of Belfast as one rateable hereditament under the words "all railways" in section 12 of the Valuation (Ireland) Act, 1852. In my opinion that course would have been competent for him, and would have been the most convenient course to adopt. Having regard, however, to the course he has adopted, each of the three portions into which he divided his valuation must be treated as a separate rateable hereditament. In arriving at his valuations he adopted the method known as the train-mile method. The Corporation of Belfast, thinking themselves aggrieved by this method of valuation, served notice of appeal to the Recorder under sect. 1 of 27 & 28 Vict. c. 52, the Valuation of Rateable Property (Ireland) Act, 1864, in respect of two of the said rated hereditaments—that is to say, in respect of the valuations of £399 10*s.* and £996 10*s.*, serving those notices on the very last day available for appealing. No notice of appeal was served in respect of the third rateable hereditament, which the commissioner had valued at £1317.

Appeal. 1914.

BELFAST CO. COUNCIL v. COMMR. OF VALUATION.

Moriarty L.J.

No question arises on this appeal in respect of the valuation of £996 10*s*. We are concerned solely with the notice concerning the valuation of £399 10*s*.

Upon the consideration of this appeal before the Recorder, he was asked to reject the train-mile method of valuation which the commissioner had adopted and had applied to the whole system, and to apply to the £399 10*s*. item a different method of valuation, which is known as the parochial system. He decided to do so, with the result that he found that the item £399 10*s*. ought to be considerably increased; but in arriving at this result he took into account, and did in fact include in his valuation, some of the subject-matters (i.e. sidings) which were included in the £1317 valuation in respect of which no notice of appeal had been served, and which in fact was not before him at all. The result would be (as Mr. Ronan of counsel for the Corporation admitted) that a gross injustice would be perpetrated by forcing the railway company to pay a double valuation on portion of their property. Mr. Ronan, while admitting the injustice, contended that there was no remedy for it. The King's Bench Division found a remedy by directing that the amount by which the valuation of £399 10*s*. was increased by taking into account portion of the £1317 valuation, should be deducted, not from the £1317 but from the new assessment, thus arriving at the result that in order to do justice an admittedly false valuation should be put upon the hereditament the subject-matter of the £399 10*s*. valuation. I am unable to agree in this. Justice can be done according to law by answering the first question proposed for solution by the Court in the negative, and in the following way:—When it appeared during the hearing of the £399 10*s*. valuation, in respect of which notice of appeal had been served, that it was necessary for the purpose of deciding the true valuation of the hereditaments rated at £399 10*s*. to take into account some part of the premises included in the £1317 valuation, in respect of which no notice of appeal had been served, the further hearing of the case of the £399 10*s*. valuation should have been stopped, and the appeal dismissed. This result is, in my opinion, to be arrived at by a true consideration of section 22 of the Act of 1852 and section 1 of the Act of 1864. Prior to 1864 a power of appeal was given

only to the person aggrieved by the valuation of any tenement or tenements contained in the lists, and the parties to the litigation were the persons aggrieved and the Commissioner of Valuation. Section 22 contained a proviso: "If the cause of appeal shall be such as to require alteration to be made in the valuation of any tenement for which any other person or persons is or are liable to be rated, the appellant shall give like notice to such other person or persons, who shall, if he or they so desire, be heard upon such appeal."

Now when the appeal was given to the council of the county or urban district, it was provided that the power of appeal should be "subject to the same conditions and provisions, and exercised in the same manner as is provided for in respect of appeals of the said owners and occupiers": Valuation (Ireland) Act, 1864, sect. 1.

I entirely agree with what the Lord Chancellor has declared to be the true construction of the Acts of 1852 and 1864.

The result is that, the Commissioner of Valuation having treated the £399 10*s.* and the £1317 valuations as separate hereditaments, it was not competent for the Corporation to have the £399 10*s.* valuation altered when its alteration necessarily involved the consideration and alteration of the £1317 valuation in respect of which no notice of appeal had been given. The whole trouble has arisen from what I regard as an absurd attempt to apply a different method of valuation to two different portions of the same railway system. The whole railway should be valued either on the train-mile method, or on the parochial method, but to apply the parochial to one part of the railway and the train-mile to another and adjacent portion of the same railway, must necessarily lead to an unjust and absurd result.

The railway company should have their costs here and in the King's Bench Division.

Solicitor for the Belfast County Council: *J. M'Cormick.*

Solicitors for the Midland Railway Company: *O'Rorke, McDonald,* and *Tweedy.*

Solicitor for the Commissioner of Valuation: *The Treasury Solicitor.*

R. ST. J. C.

K. B. Div. 1915.

June 7.

MOLLOY, Appellant; STACK, Respondent (1).

Licensing Acts—Business other than Sale of Intoxicating Liquors carried on—Prohibited Hours—Sale of Groceries—Bona Fide Traveller—Intoxicating Liquors (Ireland) Act, 1906 (6 *Edw.* 7, *c.* 39), *ss.* 2, 3.

There is nothing in the Intoxicating Liquors (Ireland) Act, 1906 (2), authorizing the sale, during prohibited hours, of anything but intoxicating liquors to bona fide travellers, and as regards the purchase by them of other commodities, they are in the same position as other members of the public. Therefore a publican who opens his premises on a Sunday to sell groceries to a person, admittedly a bona fide traveller for the purpose of obtaining intoxicating liquor, commits a breach of the Act, if the portion of the premises in which such commodities are sold is not structurally separated from the portion in which the sale of intoxicating liquors is carried on.

Case Stated by justices under 20 & 21 Vict. c. 43.

At the Listowel petty sessions held on the 8th of May, 1915, the appellant, a District Inspector of the Royal Irish Constabulary, charged the defendant, Nora Stack, of Church Street, Listowel, that "you, the defendant, being a person duly licensed to sell intoxicating liquor by retail at your licensed premises, thereat, at a time prohibited by law, and at a period during which such

(1) Before Cherry L.C.J., Palles C.B., and Gibson J.

(2) Intoxicating Liquors (Ireland) Act, 1906, sect. 2: [after providing that it shall not be lawful to sell or expose for sale intoxicating liquor, or to open or keep open any premises for the sale of the same, during the hours therein mentioned, the section provides as follows:]—"Where any business, other than the sale of intoxicating liquors, is carried on in the licensed premises, the whole of such premises shall be closed at the hours aforesaid, unless the portion of the same in which such sale of intoxicating liquors is carried on is structurally separated from the remainder of the building."

Sect. 3: "Nothing in this Act shall be construed to apply to sales of intoxicating liquors to lodgers, or to sale of intoxicating liquors in packet boats, or in canteens, in pursuance of the Acts regulating the same, or shall preclude the sale at a railway station refreshment room which is licensed for the sale of intoxicating liquors on arrival or departure of trains, or to bona fide travellers" . . . .

licensed premises are by law required to be closed, unlawfully kept open and failed to close your licensed premises from 9 p.m. on the 1st May, 1915, as required by section 2 of the Intoxicating Liquors (Ireland) Act, 1906, 6 Edw. 7, c. 39, your said licensed premises being opened for the purpose of carrying on a business other than the sale of intoxicating liquors, viz., selling tea and sugar, the portion of the premises in which the sale of intoxicating liquors is carried on not being structurally separated from the remainder of the building." He also charged the defendant Johanna Carroll, of Kilmorna, "that on Sunday, 2nd May, 1915, at Listowel, in the said district and county, you, the defendant, were found in the licensed premises of one Nora Stack, where intoxicating liquor is licensed to be sold, during a period wherein said premises are required by law to be closed, your presence therein being in contravention of the provisions of the Licensing Acts with respect to the closing of such premises, and you, the defendant, not being the inmate, servant, or lodger on such premises, or a bona fide traveller."

The following facts were admitted:—1. That Mrs. Johanna Carroll lived and slept the previous night at Kilmorna, more than three miles distant from Listowel. 2. That Mrs. Johanna Carroll came into the house of Miss Nora Stack on Sunday, the 2nd May, for a purpose which was not the obtaining of intoxicating liquors. 3. That the premises of Miss Nora Stack were open for the purpose only of supplying Mrs. Johanna Carroll with tea and sugar, and were only open in so far as was necessary for that purpose, and that Mrs. Johanna Carroll purchased only ¼ lb. of tea and 2 lb. of sugar on the occasion in question. There was no structural separation between the portion of the building in which the sale of intoxicating liquors was carried on and the portion in which groceries were sold.

The majority of the justices dismissed the charges against the publican and Mrs. Johanna Carroll on the ground that the publican was entitled under the Licensing Acts to sell groceries on a Sunday to the said Johanna Carroll, being a person who lived and slept the night before over three miles distant, even though the portion of the premises where the sale took place was not structurally separated from the portion of the premises in which

K. B. Div. 1915.

MOLLOY v. STACK.

the sale of intoxicating liquors was carried on. From the decision of the other justices the Resident Magistrate alone dissented, holding that the publican and Mrs. Carroll were bound by law to have been convicted.

The complainant contended that Mrs. Carroll was not a bona fide traveller under the Licensing Acts on the occasion in question, and that a breach of the law was committed both by her and the publican.

The opinion of the Court was sought as to whether the justices were right in law in dismissing the complaints.

The Solicitor-General (*James O'Connor K.C.*), and *Rearden*, for the appellant:—

Before the passing of the Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39), no offence would, in the circumstances existing here, have been committed. But it is provided by section 2 of that Act that "where any business, other than the sale of intoxicating liquors, is carried on in the licensed premises, the whole of such premises shall be closed at the hours aforesaid, unless the portion of the same in which such sale of intoxicating liquors is carried on is structurally separated from the remainder of the building." The words "the whole of such premises shall be closed" would be unnecessary and unmeaning if they were intended to apply only to the sale of intoxicating liquor. The whole of the premises must be closed for "other business" as well as for the sale of intoxicants: *R.* (*Richardson*) v. *Sweeney* (1). It may be that once a person is admitted as a bona fide traveller, and that there is a sale to him of intoxicating liquor, the premises are lawfully opened, and any article supplied in connexion with the "other business" may be sold to him, but it is not necessary to discuss this, as it does not arise. Johanna Carroll was admittedly a bona fide traveller under section 3 of the Act of 1906 for the purpose of obtaining intoxicating drink, but except for that purpose there is not such a person as a bona fide traveller within the meaning of the Licensing Acts.

There was no appearance for the respondent.

(1) 42 I. L. T. R. 174.

CHERRY L.C.J. :—

We are all of opinion that the magistrates were wrong in their decision. They held that a publican was entitled under the Licensing Acts to sell groceries on a Sunday to a bona fide traveller, even though the portion of the premises where the sale took place was not structurally separated from the portion of the premises in which the sale of intoxicating liquors was carried on. Section 2 of the Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39), prohibits licensed premises, where any business other than the sale of intoxicating drinks is carried on, from being opened *for any purpose* during the closing hours except for the sale of intoxicants to bona fide travellers.

There is nothing in the Act authorizing the sale of anything but intoxicating liquors to bona fide travellers, and as regards the purchase by them of other commodities, they are in the same position as other members of the public.

The result may appear strange, and possibly may not have been intended by the framers of the Act, but it clearly follows from the language used.

PALLES C.B. and GIBSON J. concurred.

Solicitor for the appellant : *Sir Malachy Kelly.*

C. L.

K. B. Div.
1915.

June 8.

RIGNEY, Appellant; PETERS, Respondent (1).

Bread—Sale of, otherwise than by Weight—Sales from a Van on Public Road—Prosecution by Common Informer—Bread (Ireland) Act, 1838 (1 & 2 *Vict. c.* 28), *s.* 4.

Section 4 of the Bread (Ireland) Act, 1838, which requires that all bread (with certain exceptions) sold in Ireland shall be sold by weight only, and not by measure, applies to sales from a van on the public road as well as to sales in a shop.

A prosecution for an offence under that section may be brought by a common informer.

Case Stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions held at Clonmel on the 23rd April, 1915, the appellant, a sergeant in the Royal Irish Constabulary, was complainant in a summons in which the respondent, as defendant, was charged for that, being a baker of bread, he "did cause to be sold to one Margaret Sullivan, of Kilsheelan, bread otherwise than by weight to the value of £1 5*s.* 8*d.*, contrary to 1 & 2 Vict. c. 28, s. 4."

It was proved by the complainant that the defendant's vanman made a delivery of bread to Margaret Sullivan of the value mentioned, and that the vanman had neither scales nor weighing machine. The complainant asked for a "hand" of bread, and asked what it should weigh, and the vanman replied, "4 lb. 11 oz." The complainant weighed the bread on Mrs. Sullivan's scales, and it was 3 oz. short.

On the part of the defendant it was contended—1. That the complainant was not the purchaser from the vanman, and was not entitled to have the bread weighed. The purchase was made by Mrs. Sullivan. She made no demand for the weighing of the bread, and no other person was entitled to require that the bread, of which she was the purchaser, should be weighed. 2. That as the sale was from a van, sect. 4 of the Act did not apply. There was no provision in the Irish, as in the English, Act, requiring

(1) Before Cherry L.C.J., Palles C.B., and Gibson J.

that the man delivering bread from a van should carry a beam and scales, with weights to weigh the bread. Moreover, the complainant did not ask for bread of any particular size or weight.

The complainant contended that as the Act was a general public Act he was entitled to prosecute on behalf of the public; secondly, that as sect. 4 of the Act stated that any baker or seller of bread who caused bread to be sold in any other manner than by weight, was liable to the penalty provided, the defendant ought to be convicted, as he admittedly caused the bread to be sold to Mrs. Sullivan.

The justices being of opinion (1) that the complainant not having purchased the bread from the vanman was not entitled to prosecute, and (2) that the sale, having been made from a van, was not governed by sect. 4 of 1 & 2 Vict. c. 28, dismissed the summons.

The judgment of the Court was required as to whether the justices were correct in point of law in their determination.

The Solicitor-General (*James O'Connor K.C.*) (with him *Rearden*) for the appellant :—

As a general rule any person may prosecute as a common informer, and the only exception is where the right is limited by statute to a particular person: *Kenealy* v. *O'Keeffe* (1).

So far as the offence is concerned, we rely on the broad words of sect. 4 of the Bread (Ireland) Act, 1838 (1 & 2 Vict. c. 28), that "all bread sold in Ireland shall be sold by the several bakers or sellers of bread respectively by weight only, and not by measure." The contract for sale must be a contract for sale by weight, and a correct method must be adopted to ascertain that the weight of the bread sold is up to the weight contracted for. In this case there was no reference to weight express or implied.

[He referred to *Cox* v. *Bleines* (2), *Slater* v. *Brewsters, Ltd.* (3), *Lyons* v. *Houghton* (4).]

(1) [1901] 2 I. R. 39.
(2) [1902] 1 K. B. 670.
(3) [1905] 2 I. R. 258.
(4) [1915] 1 K. B. 489.

K. B. Div. 1915.

RIGNEY v. PETERS.

W. G. Gibson K.C. (with him *Seely*) for the respondent:—

Although the common informer sections, 16 and 28, of the Act of 1838, would appear to have been repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 96), and the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), we feel that the decision in *Kenealy* v. *O'Keeffe* (1) makes it impossible for us to contend that there was not a competent prosecutor.

On the facts, as stated, no offence has been proved in this case. We submit that sect. 4 of the Bread (Ireland) Act, 1838, is limited to sales in shops. This view is supported, first, by the words of sect. 3, and next, by the omission from the Irish Act of any provision corresponding to sect. 7 of the English Bread Act (6 & 7 Wm. IV, c. 37). Under sect. 6 of the Irish Act, bakers and sellers of bread are bound to provide in their shops, beams, scales, and weights, and to weigh the bread if required. Section 7 of the English Act enacts that every baker and seller of bread who "shall convey or carry out bread for sale in and from any cart or other carriage" shall be provided with and carry in the cart or carriage a correct beam and scales with proper weights. The omission from the Irish statute of that section shows that the Legislature did not contemplate in Ireland the weighing of bread sold outside shops.

Even if sect. 4 applies to sales from vans, it is a sufficient compliance if the bread is weighed before sale. A deficiency in weight is not covered by the section. Further, on the facts as stated, it does not appear that the purchaser was not satisfied to accept the seller's estimate of the weight. "It is not necessary at common law that the weighing should take place before sale, or before delivery to the purchaser; and it is, of course, open to the purchaser to dispense with weighing by accepting the seller's estimate of weight": *Slater* v. *Brewsters, Ltd.* (2), *per* Madden J., at p. 266.

CHERRY L.C.J.:—

In this case the defendant was prosecuted under the Bread (Ireland) Act, 1838, and charged with the offence that he being a

(1) [1901] 2 I. R. 39. (2) [1905] 2 I. R. 258.

baker did cause bread to be sold "otherwise than by weight." We have, from the magistrates, a report of the facts which is rather confusing. They dismissed the case on two grounds: (1) that the complainant was not entitled to prosecute as a common informer; and (2) that the sale was from a van, and therefore not governed by section 4 of the Bread Act. The first point has been given up by Mr. Gibson. On the other point I fail to appreciate his argument, because the words of the section are general:—"All bread sold in Ireland shall be sold by the several bakers or sellers of bread respectively by weight only." That clearly applies to sales whether they take place in a shop or from a van on the public road, and I am, therefore, of opinion that the magistrates were wrong in the reasons which they have given for dismissing the summons. On the facts of the case as stated by them it appears to me, however, that there is a very shadowy case against the defendant. Our ordinary practice would be to determine that the magistrates were wrong in point of law in their decision, and that the case should be remitted to them to proceed according to law; but as the Solicitor-General has stated that the case will not be further proceeded with, we need not send it back to the magistrates, but merely answer the question in the way I have indicated.

PALLES C.B.:—

I agree with the Lord Chief Justice. In reference to the first point all the cases were considered in *Kenealy* v. *O'Keeffe* (1), and it is unnecessary now to deal with them.

I think it is of the utmost importance that our decision should remove any impression which may have been entertained by bakers to the effect that the Act was confined to sales in shops, which practically would exclude the greater number of sales in Ireland. The Act is unsatisfactory, when we contrast it with the legislation in England. I have, however, formed the clear opinion that, notwithstanding the omission in the Irish Act of any section corresponding to section 7 of the English Act, dealing specifically

(1) [1901] 2 I. R. 39.

K. B. Div. 1915.

RIGNEY v. PETERS.

Palles C.B.

with sales from vans, and directing that scales and beams shall be carried in those vans, the provision in section 4 of our Act that all sales of bread shall take place "by weight only" extends to all sales in Ireland. Obviously section 3 refers to some previous legislation that imposed restrictions upon the size of the loaves. It says: "It shall and may be lawful for the several bakers or sellers of bread in Ireland to make and sell or offer for sale in his, her, or their shop, or to deliver to his, her, or their customer or customers, bread made of such weight or size as such bakers or sellers of bread shall think fit, any law or usage to the contrary notwithstanding." It seems to me quite plain that the object of that section was not, as has been argued, that of enabling persons to sell bread, which would have been illusory, as the sale of bread, if the restrictions as to size and weight were complied with, was already lawful, but to remove these restrictions as to weight and size. But, at all events, that section in terms relates only to sales in "his, her, or their shop." Immediately following is the 4th section, containing the words "all bread sold in Ireland shall be sold . . . by weight only." The extent of the application of section 4 is governed by the words used—"all bread sold in Ireland shall be sold by weight." Those words include all sales, whether they are sales in shops or sales from vans. There should therefore be a declaration that the justices were wrong.

GIBSON J. concurred.

Solicitor for the appellant: *Sir Malachy Kelly.*
Solicitor for the respondent: *T. F. O'Brien.*

C. L.

IN RE MACKAY, A BANKRUPT (1).

Appeal.
1915.
June 4, 7, 8, 9.

Bankruptcy—Order and Disposition—"Becomes Bankrupt"—Deposit of Share Certificates between Act of Bankruptcy and Adjudication—Deposit of Policy of Insurance—Notice given to Insurance Company after Adjudication but before Order for Sale—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), s. 313.

By sect. 313 of the Irish Bankrupt and Insolvent Act, 1857, if a bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, the Court has power to order the same to be sold for the benefit of the creditors under the bankruptcy.

M. was adjudicated bankrupt on the 21st August, 1914, upon an act of bankruptcy committed on the 21st June, 1914. Between these dates he had deposited certain share certificates and a policy of insurance with a bank as security for his account.

Held, that M. had become bankrupt within the meaning of the order and disposition section (s. 313) of the Irish Bankrupt and Insolvent Act, 1857, at the date of the act of bankruptcy, and that, as at that date he himself was the true owner of the shares, that section did not apply.

Lyon v. *Weldon*, 2 Bing. 334, and *The Ruby*, 83 L. T. 438, followed.

In April, 1914, M. had deposited two policies of insurance with a bank as security for his account. On the 15th August he executed a legal mortgage of them to the bank. On the 21st August M. was adjudicated bankrupt, and on the same day notice of the mortgage was sent by the bank to the insurance company. In the following November an order was made *ex parte* under s. 313 of the Irish Bankrupt and Insolvent Act, 1857, for the sale of the policies for the benefit of the creditors under the bankruptcy.

Held, that the policies were, by the consent of the true owner, in the order and disposition of the bankrupt at the time he had become bankrupt, and that the bank should be ordered to deliver them to the assignees in bankruptcy.

In re Malet's Trusts, 17 L. R. Ir. 424, and *Bradley* v. *James*, I. R. 10 C. L. 441, considered.

APPEAL from an order of Boyd J. directing the appellants, the Governor and Company of the Bank of Ireland, to deliver

(1) Before O'BRIEN L.C., and RONAN and MOLONY L.JJ.

Appeal. 1915. *In re* MACKAY.

over to the assignees in bankruptcy of the above-named bankrupt, certain policies of insurance and the certificates of certain shares.

On the 6th July, 1914, John Mackay deposited with the agent of the Bank of Ireland at Dundalk certificates of the following shares standing in his name in the respective companies hereinafter mentioned, viz.:—500 fully paid up £1 shares in the Phœnix Picture Palace, Limited; 350 fully paid up £1 ordinary shares in the Southern Coliseums, Limited; and 100 shares in the Lisburn Electric Palace, Limited. At the same time he signed a letter of hypothecation, authorizing the Governor and Company of the Bank of Ireland to hold these certificates as security for advances made, or to be made, for his firm of Sheridan & Co., and he thereby authorized the bank to sell the shares and apply the proceeds towards re-payment of the sums due by the said firm. Although there was no statement on any of the certificates that the shares mentioned therein would not be transferred without the production of the certificate itself, it was stated on each of the certificates that the registered holder held them subject to the provisions of the memorandum and articles of association of the respective companies.

The articles of association of each of the companies contained a provision to the effect that the directors might decline to recognize any instrument of transfer unless it was accompanied by the certificate of the shares to which it related.

On the 8th April, 1914, John Mackay deposited with the same agent of the Bank of Ireland two policies of insurance on his life, both effected with the Scottish Widows Fund and Life Assurance Society, one for £300 and the other for £1000, to be held by way of equitable mortgage as a continuing and collateral security for all moneys due, and to accrue due, by him to the bank. He subsequently deposited another policy of insurance on his life, effected with the same assurance society, for £1000, for the purpose of enabling a legal mortgage thereof to be prepared to secure the same liabilities; and he gave instructions to the law agent of the Bank of Ireland to prepare a mortgage of this policy and the two other policies. The exact date of the deposit of this third policy did not appear, but it may be taken to have been

early in the month of August. A mortgage to the bank of the three policies was executed by Mackay at Holyhead on the 15th August, and received at the head office of the bank on the 19th August. On the 21st August notice in writing of this mortgage was sent to the insurance company by the solicitor for the bank. Advances had been made from time to time by the bank upon the said securities, and there was due to them at the time of the present proceedings a sum of upwards of £4000.

On the 21st August, Mackay was adjudicated bankrupt. The affidavit on which the adjudication was granted stated that Mackay had "departed out of Ireland two months ago with intent to defeat and delay his creditors and has never returned but remained and still remains out of Ireland with intent to defeat and delay his creditors."

On the 20th November, 1914, an order under s. 313 of the Irish Bankrupt and Insolvent Act, 1857, was made by Boyd J., on the *ex parte* application of the assignees, ordering that the above-mentioned policies of insurance and shares should be sold by the assignees for the benefit of the creditors under the bankruptcy.

The assignees subsequently applied to Boyd J., by motion on notice to the bank, for an order that the bank should deliver over to the assignees in bankruptcy the three policies of insurance and the certificates of the shares above mentioned, and on the 30th April, 1915, Boyd J. made an order to that effect.

The present appeal was taken from this order.

Herbert Wilson K.C. and *Edward Murphy*, for the appellants :—

[They contended that, as regarded the shares, the effect of the above-mentioned provisions in the articles of association was to bring the case within the principle of *Colonial Bank* v. *Whinney* (1), and that therefore the deposit of the certificates took the case out of the order and disposition section (s. 313) of the Irish Bankrupt and Insolvent Act, 1857. As will be seen, this question did not arise for decision, and consequently it is not considered necessary to report the arguments on it at length. The following authorities

(1) 11 A. C. 426.

Appeal. 1915. *In re* MACKAY.

were referred to: *Colonial Bank* v. *Whinney* (1); *Société Générale de Paris* v. *Walker* (2); *In re Grehan* (3); *In re Stephenson* (4); *In re Butler* (5); Palmer's Company Precedents, 11th ed., Part I, p. 1143, note.]

As regards the policies of insurance, notice of the deposit was given to the insurance company on the 21st August, prior to the order for sale under section 313, which was not made until the 7th November. An equitable assignee may perfect his title by giving notice of the assignment to the company at any time before an order for sale is made under section 313: *In re Malet's Trusts* (6); *Bradley* v. *James* (7); *Daniel* v. *Freeman* (8). In *In re Hickey* (9), Christian L.J., in dealing with a case like the present, says (p. 129): "No interest whatever in the policy passed to the assignees by the vesting operation of the Bankruptcy Act. Assignees step into the shoes of the bankrupt. Nothing passes to them but what was the bankrupt's own at the time of the bankruptcy." This statement of the law was adopted by Lord Fitzgerald in *Colonial Bank* v. *Whinney* (10).

Blood K.C. (with him *Swayne*), for the respondents, the assignees in bankruptcy:—

As regards the policies of insurance, they remained in the order and disposition of the bankrupt, since no notice of the deposit was given by the bank to the insurance company before adjudication. The notice was not posted until after the adjudication, although upon the same day. The adjudication takes effect as from the beginning of the day: *In re Pollard* (11). Even assuming, therefore, that the notice dates from the posting, it was given after adjudication. In order to take the case out of the order and disposition section the notice must be given before

(1) 11 A. C. 426.
(2) 11 A. C. 20.
(3) I. R. 1 Eq. 84.
(4) 27 L. R. Ir. 309.
(5) [1900] 2 I. R. 153.
(6) 17 L. R. Ir. 424.
(7) I. R. 10 C. L. 441.
(8) I. R. 11 Eq. 638.
(9) I. R. 10 Eq. 117.
(10) 11 A. C. 426, at p. 444.
(11) [1903] 2 K. B. 41.

adjudication: *Graham* v. *Furber* (1); *Young* v. *Hope* (2); *In re Styan* (3); *Ex parte Caldwell, In re Currie* (4).

It is immaterial, where notice of the assignment or pledge is given after adjudication, that the order for sale under section 313 was not obtained until after service of the notice. Once the order for sale is obtained, the particular assignee must prove notice to the company of the assignment *before* adjudication: *Bradley* v. *James* (5), per Palles C.B., at p. 448.

Further, at the time the notice was posted it is clear that the bank must have had notice of the prior act of bankruptcy. The mortgage was executed at Holyhead, so that the bank must have known that Mackay was remaining abroad with intent to defeat and delay his creditors.

As regards the shares, the case of *The Colonial Bank* v. *Whinney* (6) does not apply, since there is nothing on the certificates in the present case to show that their production is necessary to a transfer.

[Ronan L.J.: Do not the words in sect. 313, "at the time he becomes bankrupt," mean at the time of the act of bankruptcy, which in this case took place before the deposit of the certificates and the third policy? If this is so, Mackay himself was the true owner of the shares and this policy at the time he became bankrupt, and the section does not apply: *Lyon* v. *Weldon* (7); *The Ruby* (8).]

No doubt the adjudication relates back to the act of bankruptcy for many purposes, but it is submitted that it does not relate back so as to take a case out of the order and disposition section. [He referred to *Stanfield* v. *Cubitt* (9); *Smith* v. *Topping* (10); *Graham* v. *Furber* (1); *In re Styan* (3); *Heslop* v. *Baker* (11).]

[Molony L.J.: There does not appear to be any precise authority in Ireland on the question of the relation back to the

(1) 14 C. B. 134.
(2) 2 Ex. 105.
(3) M. D. & De G. 213, 219.
(4) L. R. 13 Eq. 188.
(5) I. R. 10 C. L. 441.
(6) 11 A. C. 426.
(7) 2 Bing. 334.
(8) 83 L. T. 438.
(9) 2 De G. & J. 222.
(10) 6 B. & Ad. 674.
(11) 8 Ex. 411.

Appeal. 1915. *In re* MACKAY.

act of bankruptcy in connexion with order and disposition cases.]

That is so; probably because in practice the act of bankruptcy is usually non-compliance with a debtor's summons, and the act of bankruptcy and adjudication are almost, if not actually, contemporaneous. In any event it is desirable to have the "dividing line" in reputed ownership cases definitely fixed for future guidance.

Assuming that the adjudication does relate back for such purpose, at all events the two policies deposited on the 8th April were in the order and disposition of the bankrupt within the meaning of the section. From the time of the deposit down to the 21st August no attempt was made by the bank to serve notice on the insurance company.

June 9.

O'BRIEN L.C. :—

This case at first appeared to be one in which a very important question would arise for definite decision, namely, whether or not the principle which was applied in *Colonial Bank* v. *Whinney* (1)—that where share certificates have on them a note that a transfer of the shares will not be registered without the production of the certificates, the deposit of such certificates by way of security for advances takes the case out of the order and disposition section of the Bankruptcy Act—applies to a case where, although there is no such note on the certificates, there is a somewhat similar provision in the articles of association of the company. But, after the case had been at argument for some time, it became obvious—and this was admitted by counsel for the assignees in bankruptcy—that the question would turn on a different principle altogether—a principle which will not, so far as the shares here are concerned, finally conclude all controversy between the parties, but which is so clear in point of law upon the words of the statute and the continuous practice in bankruptcy for a very long period of time, that it becomes unnecessary to decide the other question or express any opinion on it.

(1) 11 A. C. 426.

Appeal.
1915.
In re
MACKAY.
O'Brien L.C.

In the present case the bankrupt was possessed of certain shares in companies. He committed an act of bankruptcy on or about the 21st June, 1914. Considerable embarrassment has been caused by the fact that none of the affidavits give the exact date of the act of bankruptcy. The affidavit on which the adjudication was granted was sworn on the 21st August, 1914, and states that Mackay "departed out of Ireland two months ago with intent to defeat and delay his creditors and has never returned but remained and still remains out of Ireland with intent to defeat and delay his creditors." The Court adjudicated on the existence of such act of bankruptcy, and that adjudication, not having been appealed from, is binding on us.

It is a great misfortune, especially in a case like this where the dates affect the rights of third parties, that there should be any careless or loose practice as to fixing in the affidavit the date of the act of bankruptcy; and, speaking for myself, I trust that in future this matter will be carefully considered in each case.

Taking the act of bankruptcy as having been committed on the 21st June, it appears that two policies of insurance, the particulars of which are set out in the order appealed from, were, at a date prior to the act of bankruptcy, deposited by Mackay with the Bank of Ireland, and a third policy was deposited some considerable time subsequent to the act of bankruptcy and prior to adjudication. All the certificates of the shares here in question were deposited subsequently to the act of bankruptcy and before adjudication. All these deposits were made to secure moneys due, or to become due, by Mackay to the bank.

It is a very difficult matter, as a general rule, to apply the principles relating to order and disposition to choses in action. The difficulty in England has been got over by legislation, but in Ireland we continue under the old law as it was in England before the Bankruptcy Act of 1869.

The section of our Bankruptcy Act of 1857 (s. 313) is perfectly clear; it is as follows:—"If any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the Court

Appeal. 1915. *In re* MACKAY. O'Brien L.C.

shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy," . . . "At the time he becomes bankrupt" does not mean at the date of adjudication, but at the date of the commission of the act of bankruptcy. It has been held in a long series of cases that the crucial time is the time at which the debtor commits the act of bankruptcy. At a very early date in the history of the law on the subject it became manifest that the condition of affairs between the commission of the act of bankruptcy and the adjudication would have to be dealt with and considered. The section, taken literally, is quite clear, but it has been suggested that it would apply to transactions taking place after the commission of the act of bankruptcy, on the ground that there was some kind of continuity of effect down to the adjudication. This has never been regarded as law. Another principle has also been evolved, that in a case where a deposit is made before bankruptcy, you can complete your title so as to prevent the operation of the order and disposition section any time before fiat or adjudication, but not after.

With regard to this question of the date at which the person became bankrupt, the principle, which, as I have said, is an extremely old one, was acted on in *Lyon* v. *Weldon* (1), and, although the subject of criticism by a very eminent text-writer (see Williams on Bankruptcy, 11th ed., p. 260), has never been departed from, and was followed in the year 1900 in the case of *The "Ruby"* (2). There, a mortgage had been granted on a ship after the mortgagor had committed an act of bankruptcy on which he was subsequently adjudicated bankrupt, and it was held that the mortgage was protected by sect. 49 of the English Bankruptcy Act of 1883, if the mortgagee had not notice of the act of bankruptcy at the date of the mortgage, notwithstanding the fact that the ship remains in the possession of the mortgagor up to the date of the receiving order. It is true that a subsidiary question arose as to the effect of sect. 36 of the Merchant Shipping Act, 1894, but it was pointed out that that section applied only where the act of bankruptcy was committed after the mortgage, so that the decision is free from any difficulty arising from the effect of that section.

(1) 2 Bing. 334. (2) 83 L. T. 438.

The case was decided on the principle that where the mortgage is after the bankruptcy, that is after the act of bankruptcy, the order and disposition section has no application, and that the case is governed by sect. 49 of the English Act of 1883, substantially the same as sect. 328 of our Act of 1857.

When the attention of Mr. Blood was directed to the dates in this case, he stated to the Court that, having considered the matter carefully, he could not sustain the order in so far as the shares and the policy of insurance deposited subsequently to the act of bankruptcy were concerned, and I think that he was amply justified in making this admission. Accordingly, the order of Mr. Justice Boyd, so far as regards the shares and this policy, must be discharged, and in lieu thereof a different order will have to be made.

I now come to the question as to the two policies of insurance which were deposited with the bank before the act of bankruptcy. In my opinion there is no evidence that the bank, prior to the adjudication, served any notice on the insurance company that they had acquired any right or interest in these policies. Here again the law is settled beyond all question. If a mortgagee or purchaser of a policy of insurance omits to give notice to the company, he has omitted to do what in most cases is the only act which will prevent the operation of the order and disposition section. I do not say—I wish to be clear upon this—that there may not be some other means by which the operation of the section may be prevented, but in the present case there was a lapse of more than four months between the deposit of the policies and the adjudication, and during that interval no notice was served by the bank, nor was anything done by them that could take the policies out of the order and disposition of the bankrupt. As regards these two policies, therefore, the order of Mr. Justice Boyd was right, and should not be disturbed.

We were pressed with a judgment of the Vice-Chancellor in *In re Malet's Trusts* (1), in which he is supposed to have followed a decision of Palles C.B. in *Bradley* v. *James* (2). All I can say is, that possibly the decision of the Vice-Chancellor was perfectly

(1) 17 L. R. Ir. 424. (2) I. R. 10 C. L. 441.

Appeal. 1915. *In re* MACKAY. O'Brien L.C.

right on the facts of that case, and that a careful reading of his judgment satisfies me that he did not intend to lay down any proposition different from the law which I conceive to apply to this case; and I do not think that the Lord Chief Baron in *Bradley* v. *James* (1) suggested that the law was otherwise than as I have stated.

With regard to costs, the assignees have succeeded in part and failed in part, and moreover the important question which was argued here was not discussed below. Taking these matters into consideration, the opinion of the Court is that both parties should abide their own costs of the appeal and in the Court below.

RONAN L.J.:—

The application of the assignees in this case was for an order that the Bank of Ireland should be directed to deliver to them three policies of assurance and certain shares.

The sole ground of the application in the Court below was that they were within the reputed ownership section (sect. 313) of the Act of 1857. It is obvious that to bring a case within this section there must be a real owner other than the bankrupt at the date the section operates. It is also clear that this date is the date of the act of bankruptcy.

It is admitted that as to the shares and one of the policies there was not at this date such a real owner. It is clear, therefore, that the section cannot apply to this policy and the shares.

Some confusion arose apparently from the application of the protected transactions section (s. 328) to cases of reputed ownership, and Mr. Blood attempted to argue on this ground that section 313 might apply to the case.

The matter, however, is fairly clear. Section 328 only enables the real owner to take the case out of section 313. It does not enable the assignees to bring within section 313 a case not already within it. For instance, if goods were in the possession of the bankrupt, and the real owner demanded and tried to obtain possession before the act of bankruptcy, this would take the case out of the section. If he did this after the act of bankruptcy and

(1) I. R. 10 C. L. 441.

before adjudication, the Courts have held that this would be a protected dealing within section 328.

In the words of Lord Campbell in *Brewin* v. *Short* (1):— "If *before* the fiat and *after* the act of bankruptcy, they" [the real owners] "bona fide, and without notice of the act of bankruptcy, had done anything which before an act of bankruptcy would have been sufficient to determine their permission and consent to the goods remaining in the possession, order, and disposition of the bankrupt, so as that a subsequent act of bankruptcy would not have subjected the goods to be dealt with under the clause in the Bankrupt Acts respecting reputed ownership, we should have held that their title ought to prevail, although they had not, before notice of the act of bankruptcy, succeeded in obtaining the actual possession of the goods. Although no previous case appears to have gone so far, we do not find any decision or dictum adverse to this doctrine; and, looking to the language of section 133 [corresponding to section 328 of the Irish Act of 1857] and the general scope of the legislation of which it is a part, there seems strong ground for contending that the object of the Legislature was to give the same validity and force to all contracts dealings and transactions by and with any bankrupt really and bona fide made and entered into before the date of the fiat or filing of the petition, as they would have had if made and entered into before any act of bankruptcy ... Bona fide transactions between the act of bankruptcy and the fiat may reasonably be valid as to those who had no notice of the act of bankruptcy, in the same manner as if they had occurred before the act of bankruptcy; and the very harsh effect of the doctrine that the title of the assignees has relation to the act of bankruptcy may thus be beneficially modified."

This case was decided on the English Act of 1849. Sections 125 and 133 of that Act correspond to sects. 313 and 328 of the Irish Act of 1857. The principle laid down by Lord Campbell in *Brewin* v. *Short* (1) was adopted by Stirling J. in *Rutter* v. *Everett* (2), and in the cases therein referred to by him. It was

(1) 5 E. & B., at p. 235. (2) [1895] 2 Ch. 872, at p. 877.

Appeal. 1915. *In re* MACKAY. Ronan L.J.

also treated as law (though not referred to by name) by Horridge J., in *In re Neal* (1). It is obvious that it does not extend section 313 to any case not within its terms.

As to the two remaining policies, prior to the deposit on the 8th April, 1914, they were the property of the bankrupt, and of course were in his possession, order, and disposition up to the date of the deposit. Then the bank became the real owners. They allowed the same state of things to continue. They did nothing to determine their consent and permission previous to the *act of bankruptcy* so as to take the case out of section 313. Neither did they, between the act of bankruptcy and the petition and the adjudication, do anything to bring the case within the operation of the principle of *Brewin* v. *Short* (2).

Now, under these circumstances, I am of opinion that as a matter of law we must hold that these policies were in the order and disposition of the bankrupt with the consent of the true owner up to the date of the adjudication. "According to the strict principles of the law of evidence," "applying one well-known doctrine, that is, that a state of facts once proved to have existed is presumed in the absence of evidence to the contrary to continue" (*per* Palles C.B., *Curran* v. *Midland Great Western Railway Co.* (3)).

This principle was applied to reputed ownership in the leading case of *Lingard* v. *Messiter* (4). There it was proved that the bankrupt was originally the owner in possession of the property. On proof of this the judge at the trial held that there was no question to go to the jury, as this cast the burden of proof on the defendant, the real owner. The Court upheld the decision, Bayley J. saying, at p. 313:—"The question of reputed ownership, generally speaking, is a question of fact for the jury; but when it is once proved, in an action by the assignees of the bankrupt, that the latter, who was the former owner of the goods, continued in possession until the time of his act of bankruptcy, it must be taken that he continued in possession as owner till that time, unless it be shown by the defendant, not only that there was a change of ownership, but that that change of ownership

(1) [1914] 2 K. B. 910.
(2) 5 E. & B., at p. 235.
(3) [1896] 2 I. R. 183, at p. 188.
(4) 1 B. & C. 308.

had become notorious to the world." Holroyd and Best JJ. stated the law in the same terms. Now, that case was specifically approved of by James L.J. in *Ex parte Lovering* (1): and in *Société Générale de Paris* v. *Walker* (2), Lord Selborne says:—"The case is not like those under the bankrupt laws, in which the fact, or presumption, of a continuance (after a change in the equitable title) of the prior state of 'order and disposition,' or reputed ownership 'with the consent of the true owner' has to be in some way disproved."

In the application of this principle to a chose in action, such as a policy of assurance, the language of Lord Selborne in *Ex parte Watkins* (3) must be borne in mind, viz.:—"The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors or of particular creditors, and still less of the outside world who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in a such a situation as to convey *to the minds of those who know their situation* the reputation of ownership; that reputation arising by the legitimate exercise of reason and judgment on the *knowledge of those facts* which are capable of being generally known to those who choose to make inquiry on the subject." Now a man knows that the bankrupt had a policy; he wants to know if it is still his and unencumbered. What inquiry can he make? Plainly to inquire at the office if they have notice of any assignment or mortgage. In such a case we should substitute for the words "notorious to the world" in *Lingard* v. *Messiter* (4) "those who know the situation of the goods and who choose to make inquiry on the subject."

In *Rutter* v. *Everett* (5), a case of a mortgage of book debts, Stirling J. (at p. 877) cites with approval the statement of the law by Turner L.J. in *Bartlett* v. *Bartlett* (6): "How is the true owner to prevent the reputed ownership? How can it be prevented otherwise than by notice to the person who is under liability in respect of the chattels? The law has said that this is

(1) 9 Ch. App. 621.
(2) 11 A. C., at p. 31.
(3) 8 Ch. App. 520, at p. 528.
(4) 1 B. & C. 308.
(5) [1895] 2 Ch. 872.
(6) 1 De G. & J. 127, 140.

Appeal. 1915. *In re* MACKAY. Ronan L.J.

the mode of preventing reputed ownership as to debts." The bank could have done this at any time between the 8th of April and the 21st August. The passage continues: "The plain object of the statute is, that the true owner shall not permit the order and disposition to remain with the bankrupt; and if he does not take the steps which are necessary to prevent it, surely he must be taken to permit it."

There is no possible ground in this case for suggesting that the bank did all they possibly could to prevent the order and disposition remaining with the bankrupt.

MOLONY L.J.:—

I agree with the judgments which have been delivered by the Lord Chancellor and Lord Justice Ronan, and have very little to add.

John Mackay was adjudicated a bankrupt on the 21st August, 1914, and it appears that the act of bankruptcy which led to the adjudication was committed on the 21st day of June, 1914. Section 313 of the Irish Bankrupt and Insolvent Act, 1857, applies where the bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner. It is well settled that the bankruptcy commences at the time of the commission of the act of bankruptcy.

So far as this appeal deals with the shares which were not mortgaged until the 6th July, 1914, and a policy of insurance which was not deposited until early in August, 1914, the 313th section can have no application, as the bankrupt on the 21st June was absolute owner of the said shares and policy.

As regards the two policies lodged by way of security on the 8th April, 1914, the case stands on a different basis. The bank took no steps to give notice to the insurance company, or in any way to complete their security, until the 15th August, when a deed ofmortgage was executed.

On the 21st August the bank sent a notice of the assignment by post to the insurance company, but earlier on the same day the

adjudication had taken place. Between April and August the bank allowed the bankrupt to remain in possession and to be the reputed owner of these policies, with their consent and permission, and it is clear that the notice given to the insurance company after the adjudication can have no effect.

I agree in the judgment of the Court that the order appealed from should be affirmed as regards the two policies deposited on the 8th April, 1914, and discharged as regards the shares and the remaining policy.

Solicitor for the appellants: *C. J. Rutherford.*
Solicitor for the respondents: *Charles F. Mathews.*

J. G. T.

K. B. Div. Probate. 1915. June 28. July 29.

In the GOODS of SARAH HALE, Deceased.

Probate—Nuncupative Will—Wills Act (1 *Vict. c.* 26), *s.* 11—"*Mariner or Seaman being at Sea*"—*Female Typist employed on Liner—Document written on Shore in Contemplation of Sailing.*

The deceased, who had been for several years in the employment of a steamship company as a typist, was in the habit of travelling as a typist on the vessels of the company (large ocean-liners), sailing between Liverpool and New York. She spent the periods between voyages working in the company's offices in Liverpool. Her testamentary dispositions were contained in three letters. None of these documents was signed or attested as required by the Wills Act (1 Vict. c. 26), but all, though written from the deceased's lodgings in Liverpool, were written in contemplation of sailing. The deceased was afterwards lost in the sinking of one of the ships of the company.

Held, that every person employed in any branch of the Royal Navy or Merchant Service, from the highest to the lowest, is included, when at sea, in the exceptions contained in sect. 11 of the Wills Act (1 Vict. c. 26); that consequently the deceased came within the meaning of the term "mariner or seaman"; and that this term is not confined to the male sex.

Held, also, that the deceased was "at sea," within the meaning of the section, at the time of making her will.

Motion.

This was an application by Andrew Edmund Taylor, father of Helen Margaret Taylor and Dorothy Joan Hamill Taylor, minors, alleged in the notice of motion to be universal legatees under the will and codicil of the deceased herein dated respectively the 14th January, 1915, and "St. Patrick's Day," 1915, for an order that he should be at liberty to take on their behalf a grant of administration of the personal estate of the deceased, with the said will and codicil annexed, for the use and benefit of the said Helen Margaret Taylor and Dorothy Joan Hamill Taylor, until one of them should attain the age of twenty-one years.

The deceased, Sarah R. O. Hale, was in the employment of the Cunard Steamship Company as a typist, and had been

employed in that capacity since 1909 on various of the company's vessels. It was an understood thing that she should ship on such vessel as she was required for, signing on, as a matter of course, for each voyage. When the ship on which she was for the time being employed arrived at Liverpool, it was customary that she should work in the company's office there, until such time as she was required to sign on on one of the company's outgoing vessels.

On the 14th January, 1915, the deceased wrote a letter and enclosure which were placed in an envelope addressed :—

Only to be opened after my death.

To Mrs. Taylor (or Mrs. Hale),
IERNE,
Cranmore Gardens, Belfast.

The letter and enclosure were as follows :—

MILDMAY,
Blackburne Place, Liverpool,
January 14*th*, 1915.

DEAR MOTHER AND TILLIE,

I attach a paper showing how I desire my capital disposed of. My personal belongings I leave you to deal with as you wish.

I would like Miss Larisch, of Mildmay, Blackburne Place, Liverpool, to to get one of my trinkets as a remembrance, or, failing that, a piece of crystal or silver.

My books are at Plym, Manor Road, and I should like you to write to Miss Pilling, 20 Rufford Road, Liverpool, giving her a list of my library, and asking her to choose six volumes. The remainder you can keep.

Mrs. Oxton, 52 Bebington Road, Higher Tranmere, Birkenhead, Cheshire, should also get a trinket or piece of crystal.

Amongst my belongings you will find a book containing addresses, and those marked with an "X" I should like you to advise that I have died.

I have one large trunk at Mildmay, a green suit-case, a cardboard hat-box, and a leather suit-case (the last-mentioned is in Miss Larisch's room). At sea I have one cabin trunk and a kit-bag.

I hope this will be quite clear to you.

SARAH HALE.

K. B. Div.
Probate.
1915.

IN THE GOODS OF SARAH HALE.

MILDMAY,
Blackburne Place, Liverpool,
January 14th, 1915.

I desire that my entire capital, which is invested in the Cunard S.S. Co., Ltd., Savings Fund, the Post Office Savings Bank, and J. and E. Taylor, 3 Little Victoria Street, Belfast, be equally divided between my nieces, Helen Margaret Taylor and Dorothy Joan Hamill Taylor.

SARAH RACHEL ORR HALE.

In an unsigned letter, written on the 15th January, 1915, to the deceased's mother, the following passage occurred :—

I had to get up early and do my packing this morning, but now everything is finished, so to to-night I shall only have to put my things in my trunk at Mildmay. By the way, you ought to know what I keep there when I am at sea. I have my large trunk, the green suit-case (the last is in Miss L.'s room for safe keeping). In my attaché case (which is in the large trunk) you will find a note which tells you what to do in case anything happens to me. Now, for Heaven's sake don't think that I am scared, or imagine anything is going to happen to me this particular time. I merely give this information for all time, so that there will be no difficulty in case of accident. I keep my bank-book and the Cunard savings book on the top tray of my large trunk. So that is all.

On the 16th January, 1915, the *Lusitania* sailed from Liverpool, outward bound for New York, and a day or two before that date the deceased signed on for the voyage. It appeared from the affidavit of the assistant manager of the Cunard Steamship Company that the deceased had been informed some time prior to the 14th January, 1915, that she was expected to sail on the *Lusitania*. Her "Continuous Certificate of Discharge," kept under sects. 128–130 of the Merchant Shipping Act, 1894, covering the period from the 25th May, 1909, to the 6th March, 1915, was produced, and the entry for this voyage was as follows :—

Name of Ship and Official No. Port of Registry and Tonnage.	Date and place of engagement.	Rating, and R. N. R. No. (if any).	Date and place of discharge.	Description of Voyage.	Signature of Master.
"Lusitania," 124082. S. Liverpool, 12611.	16th Jan., 1915. Liverpool.	Typist.	6th Feb., 1915. Liverpool.	New York.	D. Dow.

On the 17th March, 1915, the deceased wrote a letter, which was delivered in the course of post, of which the material portions are :—

MILDMAY,

Blackburne Place, Liverpool,

St. Patrick's Day.

MOTHER AND TILLIE DEAR,

There is absolutely nothing being done in the office, so I think it is well I am going to sea, otherwise I might be out of a post . . . I have effected my insurance by paying the first premium. I enclose the receipt, which I want you to hold until my return. In case anything happened, it is better for you to hold this. You would communicate with Mr. E. Stephens, N.P.I. for Mutual Life Assurance, 1 Exchange Street, West, Liverpool, as he will hold my policy until I return. I shall try to get a card off from the ship, but in case I don't, my deepest love to you all. SADIE.

P.S.—My insurance, in case of death, I should like to be held for Helen and Joan when they attain their majority.

Some time prior to the 17th March, 1915, the deceased was informed that she was expected to sail on the *Lusitania*, leaving Liverpool outward bound for New York, on the 20th March, 1915, and a day or two before the last-mentioned date she signed on for the voyage. The *Lusitania* was sunk by a German submarine off the south coast of Ireland on the 7th May, 1915, on which occasion the deceased met her death. Her "Continuous Certificate of Discharge," covering the period from March, 1915, was lost with the ship.

The letter of the 14th January, 1915, and the document enclosed, were found after the death of the deceased in the attaché case referred to in the letter to her sister. The letter of the 14th January, 1915, and portion of the letter of "St. Patrick's Day," 1915, were type-written, but were signed by the deceased; the whole of the document enclosed in the letter of the 14th January, 1915, was in the handwriting of the deceased, who was domiciled in Ireland, and left personal estate amounting to £443 12*s.* 10*d.*, including a sum of cash deposited with a firm in Belfast.

K. B. Div. Probate. 1915.

IN THE GOODS OF SARAH HALE.

Tobias, for the applicant :—

The questions are, first, whether the deceased was a mariner or seaman within the exemption contained in the Statute of Frauds (7 Will. 3, c. 12, Ir.), and the Wills Act (1 Vict. c. 26, s. 11), in favour of wills "made by any soldier being in actual military service, or by any mariner or seaman being at sea"; and, secondly, whether she should be taken to have been "at sea" at the time when the letters were written. On the first point, the words "mariner or seaman" have been held to include a paymaster: *In the Goods of Wiseman* (1); a purser: *In the Goods of Hayes* (2); and a surgeon: *In the Goods of Saunders* (3); *In the Goods of Rae* (4), where the letter was written at Devonport the day before the deceased sailed on foreign service; and are applicable to persons in the mercantile marine: *Morrell* v. *Morrell* (5); *In the Goods of Parker* (6). In *Earl of Euston* v. *Lord Henry Seymour*, referred to in *In the Goods of Hayes* (2), Sir William Wynne is reported to have said that if it had been *res integra*, and he had been compelled to determine the question, it was "the inclination of his mind" to hold that the term "mariner" or "seaman" included the whole profession, "because he did not know where to stop."

As to the second point, the testator need not be acutally on board ship at the time the will is made, to come within the meaning of the term "mariner or seaman at sea": *In the Goods of Lay* (7). In *In the Goods of Hiscock* (8), it was held that a soldier, by taking the step of going into barracks with a view to being drafted to the seat of war, had brought himself within the operation of sect. 11 of the Wills Act, and was "a soldier in actual military service." And in *Gattward* v. *Knee* (9), it was held that mobilization may be fairly taken as a commencement of that which in Roman law was expressed by the words *in expeditione*, so that if the order for mobilization has been received, although any particular member of the force may have done nothing under

(1) 2 Sp. 63.
(2) 2 Curt. 338.
(3) L. R. 1 P. & D. 16.
(4) 27 L. R. Ir. 116.
(5) 1 Hag. 51.
(6) 1 Sw. and Tr. 375.
(7) 2 Curt. 375.
(8) [1901] P. 78.
(9) [1902] P. 99.

it, yet that order so alters his position as practically to place him *in expeditione*. In *In the Goods of Godley* (1) a soldier was held to have been "in actual military service" as from the date on which instructions from the War Office to the effect that an order for mobilization might shortly be issued were communicated to him.

Probate will be granted under sect. 11 of the Wills Act of a paper which is testamentary in part only: *In the Goods of Milligan* (2).

Cur. adv. vult.

July 29.

MADDEN J.:—

This is an application by Andrew Edmund Taylor, father of Helen Margaret Taylor and Dorothy Joan Hamill Taylor, minors, and universal legatees under the will and codicil of Sarah R. O. Hale, for an order giving him liberty to take, on behalf of the minors, a grant of administration in the usual form of the personal estate of the deceased. That the deceased was among the victims of German barbarism who lost their lives in the sinking of the *Lusitania*, is clear beyond doubt, for her body was found and identified.

The testamentary dispositions of the deceased are contained in two letters addressed by her to her mother, dated the 14th January, 1915, and in a further letter, written in the same year, and dated St. Patrick's Day, with a postscript dated Thursday, in which she gave clear and definite instructions as to how her property should be disposed of in the event of her death. With trifling exceptions, she desired that her entire property, which amounted to about £440, should be equally divided between her nieces, Helen Margaret Taylor and Dorothy Joan Hamill Taylor. The documents lodged have not been signed and attested in accordance with the provisions of the Wills Act (1 Vict. c. 26), and the question for decision is whether the case comes within the exception contained in the 11th sect. of that statute, which enacts that "any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the passing of this Act."

(1) 41 I. L. T. R. 160. (2) 2 Rob. 108.

K. B. Div. Probate. 1915.

IN THE GOODS OF SARAH HALE.

Madden J.

The documents in this case have been proved to be in the handwriting of Miss Hale. They are clearly testamentary in their character, and as they deal with personal estate only, they would have constituted a valid will before the passing of the Wills Act.

The deceased Miss Hale had been for several years in the employment of the Cunard Steamship Company as a typist, and was in the habit of travelling as a typist on the vessels of the company sailing between Liverpool and New York. A Continuous Certificate of Discharge covering the period from the 25th May, 1909, to the 6th March, 1915, is in evidence. She had in her possession at the time of her death, on the 7th May, 1915, the Continuous Certificate of Discharge which covered the period from March, 1915, onward, but this document is, of course, not forthcoming.

The documents of the 14th January, 1915, were found after the death of the deceased in a case at Mildmay House, Liverpool, where she had told her sister, the wife of the applicant, that she would find instructions, in the event of anything happening to her. The letter dated "St. Patrick's Day" was delivered in course of post.

The documents of the 14th January were written in contemplation of the sailing of the *Lusitania* from Liverpool. Miss Hale was in the service of the company at the time of the writing of those documents. She did not sign on for the voyage until the 16th January. But it is evident from the letter of the 14th that she was under orders to sail on that date.

In *In the Goods of Milligan* (1) Sir Herbert Jenner Fust held that the 11th section of the Wills Act applied to a seaman, whether in the Queen's or merchant service. The first question for decision in the present case is whether a typist employed in the merchant service is a "seaman" within the meaning of this exception. A liberal construction should be given to the language of this exception. The considerations upon which it is founded apply with equal force to every person, from the highest to the lowest, employed in any capacity in the service of His Majesty or in

(1) 2 Rob. 108.

the merchant service, when at sea. Each of them is alike *inops consilii*. Sir F. H. Jeune says: "I am inclined to the view that the reason and principle underlying those words are the same as prevailed under the Roman law, namely, that a soldier in the circumstances mentioned, or a sailor who is actually at sea, is, possibly, not altogether, but certainly to a great extent, *inops consilii*, and therefore not in a position to make his will in the form required of persons in ordinary circumstances": *In the Goods of Hiscock* (1). All that the 11th section does is to release persons so situated from certain obligations as to execution and verification which were imposed for the first time, for the protection of the public generally, by the Wills Act; and the difficulties that have arisen, and the cases that have been decided, on this branch of the law show how unreasonable it would have been to exact obedience to these obligations from persons in the position of soldiers and seamen when in service.

In my opinion, every person employed in any branch of the naval service of His Majesty or of the merchant service, from the highest to the lowest, is included, when at sea, in the exceptions contained in the 11th section of the Act. In the case of *Earl of Euston* v. *Lord Henry Seymour*, referred to by Sir Herbert Jenner Fust in *In the Goods of Hayes* (2), Sir William Wynne said it was the inclination of his mind to hold that the term "mariner or seaman included the whole profession" because "he did not know where to stop." The question in that case was whether the admiral was included in the term "seaman or mariner." Referring to this case, Sir J. P. Wilde, in holding that the term included a surgeon, said "the authorities cited sufficiently establish that a surgeon, being part of our naval service, is a seaman within the Act, and I would hold he was so for the reason assigned by Sir William Wynne, that unless the term seaman or mariner included the whole profession, I should not know where to stop. I could not attempt to draw any line across so large a service": *In the Goods of Saunders* (3). In my opinion a judge in applying the 11th section ought not to stop, but he should go forward and keep pace with the development of

(1) [1901] P. 73. (2) 2 Curt. 338. (3) L. R. 1 P. & D. 16.

K. B. Div. *Probate.* 1915.

IN THE GOODS OF SARAH HALE.

Madden J.

each branch of the service. Wireless telegraphists and typists are now as necessary a part of the equipment of a vessel like the *Lusitania* as a surgeon was in the time of Sir J. P. Wilde, and I have no hesitation in holding that they come within the exception contained in the 11th section of the Wills Act.

Then comes the question: Was the testatrix "at sea" on the 14th January, 1915? And here I derive assistance from the judgment, from which I have already quoted, of Sir F. H. Jeune in *In the Goods of Hiscock* (1). It was there decided that a private in a volunteer battalion who had sent in his name for active service in the South African War, who had been certified as fit by the medical inspector, and who had gone into barracks with a view to being draftedfor active service, and had there made his will, was at that time "a soldier in actual military service." The judge applied this test to the case of the soldier: "Had he taken some step at the time when he made his will to bring himself within the words of the section? This brings us very close, if, indeed, not actually, to the same point as what the Romans meant by *in expeditione*, for when a Roman soldier did anything towards fighting the enemy, he would have been considered, under the law of his time, as being *in expeditione*." This case was followed and applied by Boyd J., in the case of *In the Goods of Godley* (2). There is less difficulty in applying a similar test to the case of a seaman preparing for a voyage, for the words "in actual military service" are more definite and specific than the phrase "being at sea." In my opinion Miss Hale was "at sea" at the time of making her will, in a more real sense than Hiscock was "in actual military service" under the circumstances of the case stated in the judgment from which I have quoted of Sir F. H. Jeune.

It remains to be considered whether a female typist at sea can be regarded as a "seaman" within the meaning of the exception. If the word "seaman" had been interpreted in its ordinary meaning, as including only persons engaged in seamanship, I think it might have been necessary to read it as importing the masculine gender, as none but men are so engaged. But the more

(1) [1901] P. 73. (2) 41 I. L. T. R. 160.

extended meaning that has been given to the word seems to exclude a consideration of the difference of sex. Women, as we all know, are admitted to practise as surgeons. A surgeon, if at sea in the service of the merchant service, has been held to be within the exception, and included under the word "seaman," and I see no reason why I should give to this word a construction which should include surgeons of the male sex only. If I am right in including in the exception persons serving at sea in such capacities as typists and telegraphists, it seems to me that they are included without distinction of sex.

For these reasons an order will be made in the terms of the notice of motion.

Solicitors for the applicant: *Wheeler & McCutcheon.*

A. H. W.

ROBERT McCOWEN & SONS, LIMITED *v.* JUSTIN McCARTHY AND OTHERS.

Statute of Limitations—Civil-bill decree removed on Certiorari to Superior Court—Time from which Statute runs in case of such Decree—26 & 27 Vict. c. 99, s. 9.

Where a decree of a civil bill Court is removed into the High Court by writ of certiorari under sect. 9 of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, 27 & 28 Vict. c. 99 (1), it remains the judgment of the civil bill Court, and the date from which the Statute of Limitations runs as against the person who obtained the decree is the date upon which the decree of the civil bill Court was made, and not the date when the decree was removed into the High Court.

Quaere, is the effect of the removal to extend to twelve years the time within which the judgment remains unaffected by the Statute of Limitations.

---

(1) 27 & 28 Vict. c. 99, sect. 9. "If a judge of a Superior Court shall be satisfied that the party against whom judgment for an amount exceeding £20, exclusive of costs, has been obtained in a civil bill Court has no goods of chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment of the civil bill Court into one of the Superior Courts, and when removed it shall have the same force and effect, and the same proceedings may be had thereon as in the case of a judgment of such Superior Court, but no action shall be brought upon such judgment."

Palles C.B.
1915.

McCOWEN & SONS, LTD. *v.* McCARTHY.

APPEAL from a dismiss on the merits pronounced by the county court judge of the county of Kerry against the plaintiffs on February 9th, 1915.

The plaintiffs issued a civil bill, dated the 17th September, 1914, seeking to have a judgment mortgage perfected by them on the 1st March, 1906, declared well charged upon the interest of one John McCarthy, deceased, the father of the defendant Justin McCarthy, in lands of Brackloon, in the county of Kerry; and also to have an account taken of what was due to them on foot of the judgment mortgage, and an order for the enforcement of the payment of such amount by sale of the lands or by the appointment of a receiver.

The lands in question, at the date when the judgment mortgage had been registered, were held, under an unregistered title, by John McCarthy in fee, subject to a mortgage to the Irish Land Commission, the other defendants. Prior to the issue of the civil bill, John McCarthy died intestate, his heir-at-law being his eldest son, Justin McCarthy, one of the defendants.

The judgment in respect of which the plaintiffs had registered their judgment mortgage was obtained by a decree of the civil bill Court of the county of Kerry, dated April 18th, 1901, by which the plaintiffs were declared entitled as against John McCarthy to judgment for £25 4*s.* debt, and £1 19*s.* costs. On the 26th January, 1903, the plaintiffs obtained in the same Court an order against John McCarthy for the payment of the debt and costs under the decree, by instalments of £1 per month, and on the 19th April, 1904, an order of committal was made by that Court, on the plaintiffs' application, against John McCarthy for default in payment of an instalment of £1 and 7*s.* costs. On the 4th November of the same year the plaintiffs obtained a renewal of their original decree, the renewal being for a sum of £28 10*s.*, a sum which included the original debt with costs, and on the 26th October, 1905, upon the plaintiffs' application, the renewed civil bill decree was removed on certiorari into the King's Bench Division, judgment for £28 10*s.* debt and £2 14*s.* costs being entered in the King's Bench Division, and a writ of fieri facias issued out of that Division on the 7th November following. The judgment mortgage on foot of which the plaintiffs brought their

civil bill was registered on the 1st March, 1906. No payment whatever was ever made to the plaintiffs on foot of the original or renewed decree or of the judgment entered in the King's Bench Division.

Palles C.B. 1915. McCOWEN & SONS, LTD. v. McCARTHY.

The plaintiffs' appeal came on for hearing before Palles C.B., at the spring assizes, 1915, for the county of Kerry, but by consent of both parties the case was adjourned to be heard in Dublin, where the case was argued and judgment delivered.

Serjeant Sullivan K.C. and *Bernard Roche*, for the plaintiffs.
H. D. Conner K.C. and *Downing*, for the defendants.

Cur. adv. vult.

PALLES C.B. :—

June 30.

The question on this appeal, which was taken from a dismiss of the county court judge of Kerry, and, by consent, was argued before me in Dublin, is from what period the Statute of Limitations runs against a decree of a county court judge which has been removed by certiorari into the King's Bench Division under 27 & 28 Vict. c. 99, sect. 9.

That section enacts that "when removed it shall have the same force and effect . . . as in the case of a judgment of such superior Court." "It" in this section, plainly refers to "the judgment of the civil bill Court."

In my opinion it remains a judgment of the civil bill Court, and is a judgment of that Court as of the date on which it is obtained, but has the force and effect of a judgment of a Superior Court.

Assuming that the removal affects and extends the time within which it remains unaffected by the Statute of Limitations, which is doubtful, and which I do not decide, it cannot extend the time beyond twelve years from the date of the judgment. The question is, What is the date from which the twelve years are to be calculated? I am clearly of opinion that it is the date on which the civil-bill judgment was obtained in the civil bill Court; the date of that which is called in the section "the judgment of the civil bill Court." The judgment is not made the judgment of the Superior Court. It remains throughout the

Palles C.B. 1915. McCowen & Sons, Ltd. v. McCarthy. Palles C.B.

judgment of the civil bill Court, the date of which is the material date. The civil bill in the civil-bill action in which the dismiss was pronounced from which this appeal is taken, having been brought when upwards of twelve years had elapsed from that date, and there not having been any payment or other circumstance which would prevent extinction of the debt by the Statute of Limitations after twelve years from that date, the plaintiffs' claim is barred by that statute, and consequently the dismiss must be affirmed with costs.

Solicitor for the plaintiffs: *Thomas Huggard.*
Solicitors for the defendants: *F. & C. Downing.*

C. N. K.

K. B. Div.
1915.
Oct. 26.
Nov. 1.

THE KING (MOORE) *v.* MORIARTY (1).

Local Government—Rural District Council—Obligation to appoint Chairman annually—Voting at election—Member entitled to vote at any time before Close of Poll—Vote improperly rejected—Election due to such rejection invalid—Quo warranto—Statute—Construction—"May" read "Shall"—Local Government (Ireland) Act, 1898, *s.* 23, *sub-s.* 3 (*a*), *s.* 25, *sub-s.* 1 (*b*); *Local Government (Application of Enactments) Order*, 1898, *Article* 35 (5) (*b*).

At a meeting of a rural district council held for the purpose of electing a chairman for the ensuing year, two candidates, the relator and the defendant, were proposed. The defendant, who was also the outgoing chairman, presided at the meeting. Records of the voting were kept by the defendant and the assistant clerk, The defendant called the list of members. When the name of A was called, he did not answer immediately, and the defendant called the name of B, who was next on the list; but before B could answer, A said he would vote for the relator, and the assistant clerk recorded his vote accordingly. The defendant, however, refused to take A's vote, with the result that the election resulted in an equality of votes, the defendant declaring himself elected by his own casting vote. The relator applied for an information in the nature of a quo warranto directed to the defendant, requiring him to show by what authority he claimed to act as chairman of the council.

Held, that if a member clearly states the name of the candidate for whom he votes, before the close of the poll, his vote ought to be accepted; and that the election of the defendant was invalid, and ought to be set aside.

Held, also, that the words "may annually choose a chairman" in sect. 25, sub-s. 1 (*b*), of the Local Government (Ireland) Act, 1898, rendered it obligatory on a rural district council to appoint a chairman.

Held, also, that, apart from any question as to the necessity of appointing a chairman, the office was one of such importance that a disqualified person should be prevented by writ of quo warranto from acting.

QUO WARRANTO.

The relator, John Moore, was an elected member of the rural district council of Dingle.

On the 2nd June, 1915, a meeting of the rural district council

(1) Before CHERRY L.C.J. and BOYD J.

K. B. Div. 1915.

R. (MOORE) *v.* MORIARTY.

was held for the purpose of electing a chairman for the ensuing twelve months. Jonathan Moriarty, the defendant, was the outgoing chairman, and presided at the meeting. The relator and the defendant were proposed for the chairmanship.

According to the relator's affidavit, "a division was then taken, and Mr. Jonathan Moriarty called down the list of members present for the purpose of recording their votes, and the assistant clerk of the union kept a record of how each member voted. Mr. Jonathan Moriarty, when he came to the name of Maurice O'Connor in the list, called his name. Owing to the noise and confusion he did not answer at once. Mr. Jonathan Moriarty then called the next name on the list, namely, 'Denis Dowd.' Before Denis Dowd answered, I called Mr. Moriarty's attention to the fact that he had not taken Mr. Maurice O'Connor's vote. Mr. Maurice O'Connor then said, 'I'm voting for Moore,' which vote was duly recorded by the assistant clerk. On the votes being added up, Mr. Moriarty alleged that there were eighteen votes each, and said he would give his casting vote for himself, which he did, and declared himself elected." Immediately after Jonathan Moriarty had declared himself elected the relator handed in a formal notice protesting against the election, on the ground that nineteen members recorded their votes for him, and only eighteen for the defendant.

The defendant, in his affidavit, admitted that, having called out the name of Maurice O'Connor twice, and having got no reply, he put him down as not voting. He stated that he kept a record of the voting, and having completed calling over the names, and found that eighteen had voted for the relator and eighteen for himself, he gave a casting vote to himself. At the conclusion of the voting the relator stated that "he had not got a fair show." He said to the relator: "If I call over the list again, Patrick Brick will vote for me, and it will be the same thing over again." The relator did not ask him to call the roll again. During the whole course of the meeting Maurice O'Connor did not make any objection to his ruling or lodge any protest. The poll was fairly and honestly taken, and the ordinary and usual method was followed. Ample time and opportunity were given to Maurice O'Connor to vote had he wished to do so, and he did

not vote or attempt to vote in his regular time, and never offered any explanation why he did not do so.

John Moore, assistant to the clerk of the Dingle Rural District Council, stated that it was the duty of the clerk to take and record the voting of the members whenever divisions took place. For this purpose an official list was printed, which was kept and marked by the clerk, and, in case of dispute, that list was always referred to and acted on. On the 2nd June, 1915, he was directed by the clerk to keep a record of the proceedings, and to keep a division list or record of the voting. He sat beside the chairman, and had the official list before him. The chairman called out the names of the members, and as each stated for whom he voted he (the assistant clerk) took down the vote accordingly on the list. He did this under the eye of the chairman, and in the usual way, and no suggestion came from the chairman or anyone else that he was not the proper person to do it, or that he acted in any way improperly. Mr. Moriarty and Mr. Moore having been both proposed and seconded for the chair, the chairman called the list of members. "When," continued the affidavit, "Maurice O'Connor's name was called, he did not answer immediately, and the chairman called the name of Denis Dowd, which was next on the list. Before Dowd did or could answer, Mr. John Moore called out, 'give Maurice O'Connor time to speak,' and Maurice O'Connor said in a loud voice, which I clearly heard, 'I'll vote for Moore.' I at once recorded the vote on the official list. The chairman, however, refused to take the vote, and there was great shouting and confusion, and protests by Moore's supporters at this, but the chairman, after a few minutes, went on with the poll, and eventually declining to act on the official list I was keeping, and disregarding O'Connor's vote, said that the voting was equal, and as chairman he gave his casting vote in his own favour, and declared himself elected. According to the list I had kept, nineteen voted for Moore, including O'Connor, and eighteen for Moriarty, and the lists agreed, save as regards O'Connor's vote."

Maurice O'Connor deposed that before Dowd had time to answer he recorded his vote in favour of Moore, saying, in a loud voice, "I vote for Moore." He went to the meeting that day with

K. B. Div. 1915.

R. (MOORE) v. MORIARTY.

his mind fully made up to vote for Moore. It was by mere accident that he did not hear his name called by the chairman.

The relator, John Moore, obtained a conditional order for an information in the nature of a quo warranto directed to the defendant, requiring him to show by what authority he claimed to be, and to act as, chairman of the Dingle Rural District Council. The grounds upon which the order was obtained were that on the occasion of the election the defendant had not a majority of lawful votes and was not duly elected, and that a majority of lawful votes was cast in favour of the relator. The relator now moved to make absolute the conditional order.

Serjeant McSweeney K.C. (with him *Bernard Roche*) for the relator:—

On the facts, the election of the defendant as chairman was clearly invalid, and he should be prevented by writ of quo warranto from acting in that capacity.

Serjeant Sullivan K.C. and *Phelps* for the defendant:—

In the first place, the chairman is the person to conduct the election and rule all points of order. It is within his province to declare that a member present, whose name is called in order, and who does not respond, should be regarded as not voting. "The names of the members present, as well as of those voting on each occasion, shall be recorded": Local Government (Application of Enactments) Order, 1898, Article 36, sub-s. 10, Rule X. It was, therefore, contemplated that members might take part in the proceedings without voting. A member who does not respond when his name is called, and before the next name on the list is called, loses his right to vote.

In the next place, it is submitted that there is no obligation on a rural district council to elect a chairman annually. Section 25 (1) (*b*) of the Local Government (Ireland) Act, 1898, merely provides that the district council of every rural district "may" annually choose a chairman. In view of that provision a mandamus could not be granted against the district council, compelling them to elect a chairman. In cases where a writ of

quo warranto has issued, the effect is merely a judgment of ouster. If further proceedings are necessary, the prosecutor must come back to the Court for a writ of mandamus, directed to the proper persons, to hold a new election, or to declare that the prosecutor was duly and properly elected to the post. In other words, mandamus is the sanction which gives quo warranto force and validity: *The King* (*Roycroft*) v. *Justices of Schull Petty Sessions Districts and Whitley* (1), *per* O'Connor M.R. at page 620. No writ of quo warranto would be granted in such circumstances, because that remedy would be futile. An order declaring the election void would leave the defendant still chairman under the preceding election. The chairman continues in office until his successor has accepted office, and made and subscribed the required declaration: Local Government (Application of Enactments) Order, 1898, Article 37 (1). It would be absurd to grant a writ of quo warranto for the mere creation of a vacuity.

In any event quo warranto does not apply to the removal of a chairman of a rural district council. A writ of quo warranto will be granted only where the office is one of a public nature, of a substantial character, and of sufficient dignity and importance: *Reg.* (*Gelston*) v. *Hedderman and the Justices of Limerick* (2). We admit that quo warranto applies to the office of a county councillor.

Serjeant McSweeny K.C. in reply:—

The words "may annually choose a chairman" in sect. 25, sub-s. (1) (*b*), of the Local Government (Ireland) Act, 1898, make it obligatory on every rural district council to appoint a chairman at the annual meeting. That "may" really means "shall," is indicated by the fact that where clause (*b*) of sub-s. 1 of sect. 25 refers to the office of a vice-chairman, it says the council may choose a vice-chairman "if they think fit," thereby giving an option in that case.

Section 23, sub-s. 3 (*a*), says that "the rural district council shall consist of a chairman and councillors," words which show clearly that the council cannot be legally constituted without a chairman.

(1) [1910] 2 I. R. 601. (2) 30 I. L. T. R. 74.

K. B. Div. 1915. R. (Moore) v. Moriarty.

Similar words are used in sect. 1 of the Act in relation to the county council. Article 35 (5) (*b*) of the Local Government (Application of Enactments) Order, 1898, declares that the first business at the annual meeting of a rural district council "shall be the choice of a chairman." Therefore, the council must necessarily have a chairman, who is to be appointed annually.

A proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter from the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others: *Darley* v. *The Queen* (1). [He also referred to Shortt on Criminal Informations, 123, 124, and *R.* (*Burke*) v. *McCarthy* (2).]

Even if it is not compulsory on a rural district council to elect a chairman, the office is one of such a high character, dignity, and importance as to justify the issue of a writ of quo warranto. The writ has been granted in the case of a poor law guardian: *The Queen* v. *Hampden* (3). Every rural district councillor is also a poor law guardian for his district, and every chairman of a rural district council is *ex-officio* a member of the county council and a magistrate for the county.

Cur. adv. vult.

Nov. 1.

Cherry L.C.J.:—

This is an application to make absolute a conditional order for an information in the nature of a quo warranto directed to the defendant, and requiring him to show by what authority he claims to act as chairman of the Dingle Rural District Council. It appears that a meeting of that body was held on the 2nd June, 1915, for the purpose of electing a chairman. Two candidates were proposed, Mr. Moore, the relator in this matter, and Mr. Moriarty, the defendant. Article 36 of the Application of Enactments Order, 1898, directs that a record shall be kept of the voting in such cases, but it does not say by whom, and in this case two records were kept—one by the chairman (who was also

(1) 12 Cl. & F. 520.
(2) [1912] 2 I. R. 440.
(3) 6 B. & S. 923.

a candidate for election) and the other by another Mr. Moore, who was the acting clerk at the meeting. These records do not agree. That of the chairman represents (by a line opposite his name) one member of the Council, a Mr. Maurice O'Connor, as not voting; while that of the clerk returns him as voting for Moore, the relator. Everything turns on this vote, for if Maurice O'Connor had given a valid vote for Moore, as the clerk returns, Moore would have had a majority of one, and Moriarty would have had no grounds for declaring himself, as he did, elected by his own casting vote.

A number of affidavits have been filed on both sides, and there is very little dispute as to the facts. The following is the account given of the voting by the clerk (Mr. Moore), an absolutely impartial witness, whose evidence is not contradicted in any material respect by any of the witnesses for the defendant who have made affidavits; on the contrary, his account is confirmed by Mr. Scannell, who has sworn an affidavit on behalf of the defendant.

"Mr. Moriarty, the chairman," he says, "and Moore, having been both proposed and seconded for the chair, Mr. Moriarty called the list of members. When Mr. Maurice O'Connor's name was called, he did not answer immediately, and the chairman called the name of Denis Dowd, which was next on the list. Before Dowd could or did answer, Mr. John Moore called out: 'Give Maurice O'Connor time to speak,' and Maurice O'Connor said in a loud voice, which I clearly heard, 'I'll vote for Moore.' I at once recorded the vote on the official list. The chairman, however, refused to take the vote, and there was great shouting and confusion and protests by Moore's supporters at this, but the chairman after a few minutes went on with the poll, and eventually declining to act on the official list I was keeping, and disregarding O'Connor's vote, said that the voting was equal, and as chairman he gave his casting vote in his own favour, and declared himself elected. According to the list I had kept, nineteen voted for Moore, including O'Connor, and eighteen for Moriarty, and the lists agreed save as regards O'Connor's vote."

We think that it is quite clear on that evidence that

K. B. Div. 1915.

R. (MOORE) v. MORIARTY

Cherry L.C.J.

Mr. Maurice O'Connor did give a valid vote for Mr. Moore, and that it was duly and properly recorded by the clerk. We find it difficult to believe that Mr. Moriarty did not hear Mr. O'Connor vote; and if he heard him and refused to record the vote on the absurd plea that it was not given until the next name in the list had been called, we think he acted with gross impropriety. As chairman, he being himself a candidate at the election, he ought to have been most careful to be fair to his antagonist, and instead of that he appears to have snatched an advantage on a legal quibble, and illegally declared himself elected. We think on the evidence that the election was invalid, and that it ought to be set aside.

Serjeant Sullivan, for the defendant, contended that a writ of quo warranto should not be allowed to issue for two reasons: First, he said that the chairman was the person to conduct the election and rule all points of order, and that he was entitled to rule that a member who did not answer when his own name was called, and before the next name on the list was called, forfeited his right to vote—that he thereby in effect declared that he did not desire to vote, and that he could not afterwards change his mind. It does not appear that the chairman in this case made any such ruling; and even if he did, we think that such a ruling would not be binding on members who might possibly not have heard their names called. We think that if a member of the council clearly states the name of the candidate for whom he votes, before the close of the poll, his vote ought to be accepted, and if it is improperly rejected, we think that such rejection would be sufficient ground for quashing the election, if, as in this case, the acceptance of the vote would affect the result of the election.

The second ground put forward by Serjeant Sullivan against the issue of the writ was a more serious one. He argued that the order would be a worthless one, inasmuch as the appointment of any chairman at all of a district council is optional. Section 25, sub-sect. 1 (*b*), of the Local Government Act, 1898, provides that the council "*may* annually chose a chairman, and if they think fit, a vice-chairman, from among the councillors." He says, therefore, that no mandamus would be allowed to issue to compel a district council to elect a chairman, and that therefore no writ of

quo warranto should issue in respect of the office. But the word "may" is frequently used in statutes as equivalent to "shall"; and the use of the words "if they think fit," in relation to the election of a vice-chairman, when they are omitted in dealing with the chairman, would appear to us to indicate that it is so used in the section, and that it was intended to make the election of a chairman obligatory, while that of a vice-chairman was to be optional. This view is borne out by other provisions of the statute and orders made thereunder. Thus section 23, sub-section 3 (*a*), provides that "the district council shall consist of a chairman and councillors," which seems to imply that there shall always be a chairman. Similar language is used in reference to the county council in section 1 of the Act.

Apart from these questions, which refer to the functions of the chairman of a district council as such, it must be remembered that such chairman during his year of office is *ex-officio* a member of the county council and a magistrate for the county. It is most important that unqualified persons should be prevented from acting in either capacity, and we see no reason, quite apart from any question as to the necessity of appointing a successor as chairman, why a disqualified person should not be prevented by writ of quo warranto from acting.

For all these reasons we are of opinion that the conditional order in this case should be made absolute.

BOYD J.:—

I agree with the judgment of the Lord Chief Justice, and generally with the argument in support of the quo warranto. I only desire in further support of the judgment to refer to the Local Government (Application of Enactments) Order, 1898, Art. 35 (5) (*b*), which provides expressly that the first business at the annual meeting of a rural district council "shall be the choice of a chairman," thus making it compulsory upon them, in my opinion, to discharge that duty.

Solicitor for the relator: *R. H. Hudson.*

Solicitors for the defendant: *F. & C. Downing.*

C. L.

K. B. Div. 1915.

April 30. May 7.

JAMES McMAHON, Ltd., *v.* O'NEILL and Another (1).

(1914. No. 1852.)

Building Contract—Assignment of Retention Moneys—Work taken out of Contractor's hands—Contract with Sureties to Complete—Right to Retention Moneys on Completion.

C., a builder, contracted under a written contract with the Corporation of L. for the erection of certain houses. Payments were to be made upon progress certificates for not more than seven-eighths of the value of the work done and materials on the ground, the balance to be retained until after final certificate. It was a term of the contract that if the Corporation's architect was satisfied that C.'s method of executing the works made it improbable that the works would be completed within the time specified in the contract, the Corporation should be at liberty, on giving to C. ten days' written notice, to take possession and carry out the completion by employing other persons by contract or otherwise. C. had executed part of the works, in respect of which he was paid moneys on progress certificates and in respect of which certain retention moneys payable on completion had accrued, and being indebted to the plaintiffs in the sum of £150, gave an order in writing to the Corporation to pay this sum to the plaintiffs out of the retention moneys. Subsequently the architect of the Corporation certified that it was not reasonably probable that the works would be carried out within the contract time, and the Corporation served notice on C. that after ten days possession would be taken up in accordance with the contract. Prior to the expiration of the ten days the defendants, C.'s sureties for the due performance of the contract, offered to hand over the works to an independent contractor who would undertake to complete for the balance of the moneys in the hands of the Corporation on foot of the contract. The corporation, by resolution, accepted this offer. The defendants contracted with K. to carry out the works for the balance of the contract money unpaid, including the retention moneys. On the defendants' order the moneys payable on the progress certificates issued after K. undertook the work were paid to K. by the corporation. The work was duly completed by K., and he got a final certificate. An interpleader issue having been directed to determine whether the plaintiffs or the defendants were entitled to this sum of £150:

Held, that the defendants were entitled to the sum in question, on the ground that the original contract was determined and a new substituted contract entered into between the corporation and the defendants, amounting

(1) Before Gibson J.

to a direct bargain that the defendants should complete the work on the terms of the old contract so far as applicable; and on the ground that whether the defendants did the work themselves or through a contractor they were, as sureties for C., entitled to be indemnified for the costs incurred by them, to the extent of the unpaid price.

TRIAL by Gibson J., without a jury, of an issue directed on an interpleader summons under Order LVII, Rule 7.

On the 28th August, 1912, the Corporation of Limerick entered into a written contract with one Connolly, a builder, for the erection of certain houses in Limerick at the price of £9190. The contract provided that materials brought on the ground should become the property of the Corporation, and that, upon delay by the contractor which rendered the completion of the works within the contract time unlikely, the Corporation, on giving Connolly ten days' notice in writing, should be at liberty to take possession and employ other persons by contract or otherwise. Payments were to be made on progress certificates for not more than seven-eighths of the value of the work done and materials on the ground, the balance of that value not paid on the certificate to be held by the corporation as retention moneys, and to be paid to Connolly on the completion of the contract works, and six months after the final certificate. The progress certificates were not to be final and conclusive. The defendants guaranteed the due performance of the contract by Connolly by their joint and several bond.

Connolly having begun the contract works, executed them in part, and was paid sums on progress certificates from time to time, the last payment being made on the 8th May, 1913. In respect of these progress certificates retention moneys had accrued, amounting to £408 11*s.* 9*d.* On the 28th March, 1913, being indebted to the plaintiffs in the sum of £150, Connolly gave to the Corporation an order in writing to pay this sum to the plaintiffs out of the retention moneys. On the 31st May, 1913, Mr. Peacocke, the architect of the Corporation, certified that Connolly's progress on the work made it improbable that the works could be completed within the contract time, and on the 2nd June following, the town clerk served a written notice on Connolly, setting out that certificate and giving Connolly notice

K. B. Div. 1915. McMahon *v.* O'Neill.

that at the expiration of ten days from service, the Corporation would take possession of the works under the conditions of the contract. On the 10th June, before the ten days had expired, Mr. O'Donnell, the defendants' solicitor, on behalf the defendants, wrote to Mr. Peacocke as follows:—

Dear Sir,

Re Contract for the erection of forty-eight houses at Prospect Hill.

Joseph Connolly

To Limerick Borough Council.

On behalf of Messrs. John Clancy and Thomas O'Neill, the sureties for above contractor, I beg to inform you that after the expiration of the ten days' notice served by you upon the contractor, they propose to hand the contract to a reliable and independent contractor who will undertake to complete the work to your satisfaction for the balance of the money on your hands on foot of the contract, and trust that this course will meet with your approval, as I am sure your council will recognize that my clients should have the alternative of completing the contract or of being entirely released from any responsibility.

On the 19th June following, at a meeting of the Corporation, a resolution, "that the sureties be allowed to finish the contract as requested," was passed on the consideration of the above letter, and on the following day the town clerk notified Mr. O'Donnell of the resolution passed at the meeting.

The defendant having agreed with one Kenny, a builder, for the carrying out of the works for the balance of the contract price, including the retention moneys in the hands of the corporation, notified Mr. Peacocke, through their solicitor, on the 30th June, that they had made arrangements with Kenny for the completion of the work. Kenny commenced work the following day, and carried out the completion of the contract works, being paid, on the defendants' order, by the Corporation on provisional certificates.

On the 6th August, 1913, Connolly was adjudged a bankrupt. The official assignee, on the 1st December, 1913, wrote to the town clerk asking to be informed as to whether the ten days' notice required by the contract had been served, what was the amount of the retention money, and requesting a copy of the agreement with the new contractor, to which letter the town

clerk replied, "No new contractors, as the work was handed to contractor's sureties."

The work was duly completed by Kenny, and he obtained a final certificate. The retention moneys and value of materials, £408 11*s.* 9*d.*, having become payable, the plaintiff claimed to be paid his £150 under Connolly's order of the 28th March, 1913, while the defendants claimed the whole of the retention moneys as part of their contract price, and the official assignee also claimed the whole sum as assets of the bankrupt, Connolly. The Corporation lodged in Court the whole sum of £408 11*s.* 9*d.*, and took out a summons under Order LVII for liberty to interplead, with which summons the plaintiffs and defendants and the official assignee were served. On the hearing of the application an order was made, dated 24th February, 1915, declaring that the claim of the official assignee to £150 of the moneys lodged was barred, and ordering an issue to be determined at the ensuing Easter session of the King's Bench between the plaintiffs and defendants on the question, "whether either, and if so which of the two, the said James McMahon, Limited, or the said Thomas O'Neill and John Clancy, are entitled to the sum of £150 out of the sum lodged in Court," the right of the defendants to the balance of the sum lodged being reserved until that issue was heard and determined, with liberty to the official assignee to apply on notice.

Powell K.C. (with him *Phelps*), for the plaintiffs:—

The agreement between the defendants and the Corporation was only a continuation of Connolly's contract, and was carried out for his benefit: *In Re Moss* (1); *Drew* v. *Josolyne* (2).

S. L. Brown K.C. and *Robert Holmes*, for the defendants:—

A new contract was made by the acceptance by the Corporation of the offer made in Mr. O'Donnell's letter of 10th June, and the contract price under that agreement was the balance of the moneys due under Connolly's contract, including the retention moneys. Even if no such contract, the sureties, if they undertook the work to make good their principal's default, were entitled to recoup them-

(1) 14 Q. B. D. 310. (2) 18 Q. B. D. 590.

K. B. Div. 1915. McMahon v. O'Neill.

selves for loss out of the retention moneys: *Tooth* v. *Hallett* (1); *Smith* v. *Kirk* (2).

Phelps in reply.

Cur. adv. vult.

May 7.

Gibson J.:—

The question raised relates to £150, part of the sum of £408 11*s.* 9*d.* lodged, which part is retention money proper, the balance representing the value of materials on the site at the time that Connolly was discharged. This latter sum is not operated on by Connolly's paying order, March 28th, 1913, and is not, therefore, the subject of this interpleader. The plaintiffs, Messrs. McMahon, Ltd., appear to have no better title than Connolly. If they can recover, so could he, if there had been no assignment of the debt to the McMahons. The plaintiffs contend that Connolly's contract preserved continuous and unbroken life; that it was carried out for his benefit; and that his title to the money lodged is now complete. The defendants, Connolly's sureties, contend—1, that the original contract was determined, and that a new contract comprising the original terms was entered into between the Corporation and the sureties, who accepted primary liability; 2, that, as sureties, they are entitled to the retention money as security against loss.

The facts are these:—Connolly was employed, under contract of August 28th, 1912, by the Limerick Corporation, to build forty-eight cotttages at the price of £9109, reduced by subsequent omissions to £8951. The conditions of the contract made materials, when brought on the ground, the property of the employer (clause 5), and enabled the Corporation, if the contractor was guilty of delay making completion within the contract time improbable, on giving ten days' notice, to take possession and employ other persons, by contract or otherwise, as deemed proper, and to use all plant and materials on the ground (clause 8). Payments were regulated by clause 14, and were to be made on progress certificates, not exceeding seven-eighths of the work done and materials remaining on the ground. The balance was to be

(1) L. R. 4 Ch. 242.

(2) 25 L. T. (N. S.) 426.

payable after possession was given up to the Corporation, six months after the final certificate. Certificates were a condition to the right of payment. Progress certificates were not to be final and conclusive. Clause 16 enables the Corporation, on Connolly's bankruptcy, to employ other persons to complete, on giving ten days' notice. The defendants secured the performance of the contract by bond of 8th August, 1912.

Connolly, having proceeded with the work and got several progress certificates, on the 28th March, 1913, gave the plaintiffs the paying order for £150, which was duly notified to the Corporation. He subsequently failed to proceed with the contract, and, on May 31st, 1913, a ten-day notice was duly served, pursuant to clause 8. The validity of this notice was not disputed, and, on its expiration, the Corporation was entitled to proceed to get the buildings completed. According to Mr. Peacocke's statement of account, 20th April, 1913, Connolly had been paid before he left, £2430, the last payment being on May 8th, and Connolly's claim, if there had been no retention money, would have been some £2777 up to that date. In the certificate of the 6th February, 1915, the total value of the work up to the 13th June, 1913, is £2582 17*s.* 5*d.*, and materials £255 14*s.* 4*d.* When the notice expired, the liability of the sureties at once would arise, and their solicitor, Mr. O'Donnell, on the 10th June, wrote to the city surveyor, Mr. Peacocke, proposing, after the expiration of the ten days' notice, to hand the contract to a reliable independent contractor who would undertake to complete the work to his satisfaction "for the balance of the money in your hands on foot of the contract."

On the 19th June a resolution was carried, that the sureties be allowed to finish the contract as requested in this letter.

On the 30th June, 1913, an agreement was entered into between the sureties and Mr. John Kenny, a builder, whereby, after reciting the contract of the 8th August, 1912, and what had taken place, Kenny contracted to complete the buildings for the balance of the contract money still unpaid, including the retention money in the hands of the Corporation, and to indemnify the sureties. This contract construes O'Donnell's letter of June 10th

K. B. Div. 1915.

McMahon v. O'Neill.

Gibson J.

as including the retention money. That was O'Donnell's intention, and the letter invites that interpretation.

On the 1st July the materials were handed over to Kenny, and a receipt drawn by O'Donnell was given to the Corporation on behalf of the sureties.

Neither the Corporation nor Connolly were parties to Kenny's contract. Connolly became bankrupt shortly after. The work was duly completed by Kenny, who got his final certificate on the 12th April, 1915.

On the above facts three different views may be suggested :— 1, the contract of August 8th was treated as continued on behalf of Connolly through his sureties, and the notice was treated as abrogated; 2, the sureties, as a favour, were allowed to undertake the responsibility as direct contractors; 3, the Corporation accepted Kenny as the sureties' nominee on terms of payment not exceeding the balance in hand. It is to be observed that as the progress certificates issued to Kenny were provisional (see Clause 14 and the *Tharsis Sulphur and Copper Company* v. *McElroy* (1)), Kenny might be responsible for any default afterwards found in Connolly's work, and certainly the sureties would be so responsible.

I am of opinion that O'Donnell's letter, and the resolution adopting it, assume that Connolly was no longer to be considered entitled to finish the contract, and the sureties entered into a direct bargain to complete the contract. The agreement was for their benefit, not for that of Connolly; it was no part of the contract of suretyship. Plaintiffs' counsel admit that if there was a new contract they cannot succeed, but they press *Ex parte Moss* (2), and *Drew* v. *Josolyne* (3), as establishing that there was no new contract. In both of these cases the contract was carried out by a trustee in bankruptcy in direct privity with the contractor, and there was no determination of the contract on the owner's part. Defendants' counsel, on the other hand, rely on *Tooth* v. *Hallett* (4), and *Smith* v. *Kirk* (5), to which may be

(1) 3 A. C. 1040.
(2) 14 Q. B. D. 310.
(3) 18 Q. B. D. 590.
(4) L. R. 4 Ch. 242.
(5) 25 L. T. (N. S.) 426.

added the reasoning of Farwell J., in *Hart* v. *Porthgain Harbour Company, Ltd.* (1), and *Howe* v. *Smith* (2), recently approved by Lord Atkinson in *Stickney* v. *Keeble* (3), as showing that Connolly could have no claim to the retention money (which it was settled law was a security for the due performance of his contract), and that the plaintiffs are in no better position.

Connolly being out of the way, the sureties, who wanted to avoid loss which might arise if the completion of the work was given to a new contractor, made the proposal accepted by the Corporation, which contemplated the engagement of a contractor by them at their risk. The Corporation did not act at the request, or in the interest, of Connolly, and, if the work was properly done at the original price, they would have no ground of complaint. *Tooth* v. *Hallett* (4) was not at all so strong a case, as there, after the original contract fell through, it was carried out by the builder's trustee. In *Smith* v. *Kirk* (5), though the judges were equally divided, the result was an absolute decision when the junior judge withdrew his judgment. There could have been an appeal. In *Reg.* v. *Mills* (6) our marriage law was settled by a similar course in the King's Bench, the judgment of which stood affirmed by the House of Lords being equally divided. The judgments of Kelly C.B. and Bramwell B. are on the lines afterwards adopted by Farwell J. in *Hart's Case* (1).

If O'Donnell's letter covers the retention money (as I hold) there was plainly a new contract. If the Corporation had done the work by direct labour, or by contract, the retention money would have been held to recoup them against loss.

This brings me to the second point urged for the defendants. The retention money was to secure performance, and the sureties were entitled to that protection. Taking the sureties as accepting direct responsibility, and at liberty to employ direct labour, if in point of fact the completion cost them a sum equal to or exceeding the balance of the contract price (including the retention money up to Connolly's discharge), it would seem to me that Connolly,

(1) [1903] 1 Ch. 690, at pp. 695. 696.
(2) 27 Ch. D. 89.
(3) [1915] A. C. at p. 403.
(4) L. R. 4 Ch. 242.
(5) 25 L. T. (N. S.) 426.
(6) 4 I. L. R. 495.

K. B. Div. 1915.

McMahon v. O'Neill.

Gibson J.

whose breach of contract imposed such loss on his sureties, could not, as against them, demand payment of such retention money. The sureties did not, however, do the work themselves. They employed Kenny, and there is nothing to show that their arrangement with him was improvident. Kenny, who was not protected by Connolly's provisional progress certificates, naturally stipulated that he should get the retention money as part of his payment. It was a hazardous thing to undertake to complete work discontinued by a discharged contractor who had done so much in ostensible performance as to have received £2430. I think the sureties were entitled to make the best arrangement they could in accordance with the terms of O'Donnell's letter, assented to by the Corporation. The Corporation treated Kenny as the person entitled to receive certificates and payment thereunder. If they had constructive notice of his bargain with the defendants, they must be taken to have adopted it. They never inquired what Kenny's terms were. If the defendants do not get the retention money, they must make good the loss to Kenny at their own expense. In other words, the sureties would have to pay the principal for his default, as to which the observations of Selwyn and Giffard L.JJ., in *Tooth* v. *Hallett* (1) are material.

The only cases where a paying order has been enforced appear to relate to trustees representing in law the defaulting contractor, and no authority has been cited applicable to such facts as are found here. The original contractor was eliminated, and the sureties as new contractors substituted. No argument was addressed before me to the terms of the original contract, and it is conceded that if there was a new bargain the plaintiffs must fail. I am of opinion that there was such new substituted contract embracing the old terms, so far as applicable, and also that whether the sureties did the work themselves, or through a contractor, they are entitled to be indemnified for the cost incurred by them to the extent of the unpaid price. Connolly has no claim to have his contract carried out at a loss to the sureties. Their position is quite unlike that of a builder's trustee or assignee in bankruptcy.

(1) L. R. 4 Ch. 242, at pp. 245, 246.

With regard to the value of the material, no question arises on this interpleader, and I abstain from offering any opinion. The assignee in bankruptcy has made no claim. *Hart's Case* (1) may bear on this question.

Solicitors for the plaintiffs: *P. S. Connolly & Co.*
Solicitor for the defendants: *P. E. O'Donnell.*

C. N. K.

MORIARTY, APPELLANT; O'DONNELL, RESPONDENT (2).

Local Government — County Council — Member Acting when Disqualified — "Paid Office under or in the Gift of the Council" — Member of Council Acting while Member of Committee of Management of Light Railway to which he was appointed by Council, and for which he received a Fee — Local Government (Application of Enactments) Order, 1898, Art. 12 (4) (d).

Any employment under or in the gift or disposal of a county council in respect of which the person employed receives any payment, however small, is a "paid office under or in the gift or disposal of the council" within the meaning of Article 12, (4) (*d*) of the schedule to the Local Government (Application of Enactments) Order, 1898, and such employment disqualifies the employee from being appointed as, or acting as, a member of the council.

A light railway, constructed under an order made pursuant to 46 & 47 Vict. c. 43, became, under sect. 10 of that statute, vested in the grand jury of the county of Kerry. Prior to the transfer of the control of the railway from the grand jury to the county council under sect. 4 (1) of the Local Government (Ireland) Act, 1898, an Order in Council was made by the Lord Lieutenant directing the grand jury to appoint as committee of management of the railway six persons who were cess-payers of the guaranteeing baronies with a valuation of not less than £20, and also directing that each ordinary member of such committee should be remunerated by the payment of a "fee" of £1, or such other sum as the Lord Lieutenant should by an Order in Council direct, and that the chairman should be paid a "salary" not exceeding £70 per annum. After the transfer of the control of the railway to the county council, the committee was appointed by the county council. The respondent had been appointed by the county council a member of the committee of management of the railway, and received as remuneration the

(1) [1903] 1 Ch. 690.
(2) Before CHERRY L.C.J. and BOYD J.

K. B. Div. 1915.

MORIARTY v. O'DONNELL.

fee of £1, and also a free pass on the railway. While holding this appointment he acted as a member of the county council.

Held, that the respondent held a paid office under or in the gift or disposal of the county council within the meaning of Art. 12 (4) (*d*) of the schedule to the Local Government (Application of Enactments) Order, 1898, and was, therefore, disqualified from acting as a member of the county council.

CASE STATED, under 20 & 21 Vict. c. 43, by the justices of the peace for the county of Kerry.

The appellant, as complainant, issued a summons by which the respondent, as defendant, was charged with having on the 6th of May, 1915, and on divers dates within the six months previous to the date of the summons, unlawfully acted as a member of the Kerry County Council when disqualified as such member by reason of his holding a paid office or place of profit as member of the committee of management of the Tralee and Dingle Light Railway, which office or place of profit was under or in the gift of the county council.

The prosecution was brought under Article 12 (4) (*d*) of the Schedule to the Local Government (Application of Enactments) Order, 1898. That article provides as follows:—A person shall be disqualified for being elected or chosen or being a member of a council of a county or district, or of a board of guardians or of any town commissioners if he . . . (*d*) holds any paid office or place of profit under or in the gift or disposal of the council, board, or commissioners, as the case may be, other than that of mayor or sheriff."

The summons was heard by the justices at Tralee Petty Sessions on the 14th June, 1915, when both the appellant and respondent were present. Proof was given that the respondent had been appointed, and had accepted office, as a member of the county council of the county Kerry, and had acted and voted as such member on the date charged in the summons. It was also proved that at the date in question the respondent was, and acted as, a member of the committee of management of the Tralee and Dingle Light Railway, having been appointed by the county council to act as such member of that committee for the year commencing June, 1914, and expiring June, 1915, and that the

respondent, as such member of that committee, had received a fee of £1 and a free pass over the railway. Proof was given that the committee consisted of six members, appointed pursuant to an Order in Council of the 22nd June, 1896, four of whom, the respondent being one, were members of the county council of Kerry, one of the remaining two members being the representative of and a member of the Tralee Urban Council, the other, who was not a member of either council, being chairman of the committee. It was further proved that all the members of this committee, excepting the Tralee urban councillor, lived at a distance from Tralee, where the meetings of the committee were held, and that there were twelve fixed meetings of the committee every year, and sometimes two or three extra meetings, which the members attended. No remuneration was given to the ordinary members save £1 yearly to each and a free pass on the railway. The chairman received, under the Order of 1896 above referred to, an annual salary not exceeding £70.

The Tralee and Dingle Light Railway had been constructed in or about the year 1888, under an Order made pursuant to the Tramways and Public Companies (Ireland) Act, 1883 (46 & 47 Vict. c. 43), and by reason of the guaranteeing baronies having been called upon to pay money under the provisions of s. 10 of that statute, the property and control of the railway passed to and became vested in the grand jury of the county of Kerry. Under the original order of construction directors were appointed, their remuneration being fixed at a sum not exceeding £20 per annum for each director. The Order in Council of the 22nd June, 1896, provided that the grand jury of the county of Kerry at each summer assizes should appoint six persons to form a committee of management of the railway, and that each member should be a cesspayer of the guaranteeing baronies of an annual valuation of not less than £20, and at least one member should be from the Tralee Town Commissioners. By paragraph 10 of the Order the remuneration fixed was, as regards each ordinary member, a yearly "fee" of £1, or such other sum as the Lord Lieutenant should by order direct, and as regards the chairman, a "salary" not exceeding £70 per annum. On the passing of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), the property

K. B. Div. 1915.

MORIARTY v. O'DONNELL.

in and control of the railway passed to the county council of the county of Kerry pursuant to section 4, sub-section 1, of that statute. Evidence was given before the justices that since that transfer the committee of management of the railway had always been appointed by the county council, and that members of the council had been appointed as members of the committee for seventeen years without any question as to the legality of such practice. Since the passing of the Local Government (Ireland) Act, 1898, the qualification of payment of cess required by the Order of 1896 had ceased to exist by reason of the abolition of cess.

The majority of the justices, the resident magistrate alone dissenting, held upon the facts that membership of the committee of management of the railway was not a "place of profit within Article 12 (4) (*d*) of the Schedule to the Local Government (Application of Enactments) Order, 22nd December, 1898, the £1 being a "nominal" payment. The resident magistrate held that the facts proved that the membership of the committee was a "paid office" within the meaning of that article, and that a conviction should follow.

The magistrates dismissed the summons, but, on the application of the complainant, stated the present case.

James Rearden for the appellant:—

The disqualification arises under Article 12 (4) (*d*) of the Schedule to the Local Government (Application of Enactments) Order, 1898, made pursuant to sect. 104 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37). Sections 11 and 94 of that statute enact the penalties for acting when disqualified.

The majority of the magistrates only dealt with the question as to whether membership of the committee of management constituted a "place of profit" within the article. The resident magistrate alone appears to have considered whether on the facts such membership was a "paid office" within that article. On the facts proved, which are not disputed, the respondent's membership of the committee was both a "paid office" and a "place of profit" under or in the disposal of the council of which he was a member.

The committee was a delegated body of the council, and each member received his £1 and also a free pass on the railway. It was suggested that the £1 was merely to meet expenses, but no evidence was given that the free pass was only available on journeys to and from the meetings of the committee and not generally so long as its holder continued to be a member of the committee. In the absence of proof to the contrary it must be assumed that this pass was generally available, and a free pass might be a very profitable privilege to a resident in the county. If a profit could be made out of the membership, such membership clearly comes within the article, the aim of which is the exclusion from the council of any person with a pecuniary interest in the business of the council. Where a profit is possible individual interest may be inconsistent with public duty.

The facts are conclusive on the question whether this is a "paid office." The definition of "office" in sect. 109 of the Local Government (Ireland) Act, 1898, includes "any employment." Here the respondent was employed to manage the railway as the delegate of the council, and he received and was bound to receive his fee of £1 for that service. It would be absurd to suggest that the membership of this committee was a sinecure post carrying no duties for which the respondent was responsible, and the proof negatives any such assumption, as the evidence is that from twelve to fifteen meetings of the committee were held every year. Once it is proved that a person is appointed by a council to perform duties or services in respect of which he receives a payment, his situation is that of a paid officer. *Nell* v. *Longbottom* (1) is an authority showing that the quantum of the payment is immaterial, if any payment is made.

Phelps and *Serjeant McSweeny K.C.* for the respondent :—

If this Court decides that the magistrates were wrong, a most disastrous result would follow, as there are numerous cases in Ireland where light railways, vested in grand juries and transferred to county councils, are controlled and managed by the latter by these committees, the members of which are members of the

(1) [1894] 1 Q. B. 767.

K. B. Div. 1915.

MORIARTY v. O'DONNELL.

councils. The practice of appointing members of councils as committee-men has been carried on for seventeen years without challenge, and that very fact shows that it is and has been a practice under which public interests have not suffered any detriment. Should this Court decide that the magistrates were wrong, the whole machinery for the control of many of these railways will be dislocated to the public's disadvantage.

On the facts it is absurd to suggest that the respondent either holds a "place of profit" or a "paid office." A sum of £1 paid to a person who from a distance has to attend from twelve to fifteen meetings at Tralee could not be a matter of profit when the expenses of the attendance are considered. It is probable that the sum would not cover expenses; it would amount to 1*s.* 8d. or 1*s.* 4d. for each meeting. It is suggested that the respondent might make his free pass profitable, but there is no proof that he did, and the affirmative rests on the prosecution. This Article 12 (4) (*d*) is in the nature of a penal provision, and as such should be construed strictly in the subject's favour; penalties should not be imposed upon a suggestion of profit negatived as to the £1 by the proved facts, and resting as to the free pass on surmise unsupported by proof.

The respondent does not hold any paid office, as his position as a committee-man is not an office at all. He is the representative of the former directors of the company, and he is a delegate of the corporate body, proprietors of the undertaking. He has no duties prescribed, such as a secretary or other "official" would have: he is in no sense the bearer of "office" such as the mayor or sheriff is; he is the representative charged by the Statutory Order of 1896 with the control on behalf of the council of this particular property. He is paid a fee of £1 because the Order so directs, and that payment is a matter which the council cannot deal with or vary, as they can the salary of the chairman of the committee. Further, who does the appellant suggest is now a person qualified to act as a member of this committee? The Order of 1896 provides the qualification of payment of cess, but cess is now abolished, and cesspayers have ceased to exist. Under the Tramways and Public Companies (Ireland) Act, 1883 (46 & 47 Vict. c. 43), and the Local Government (Ireland Act,

1898, the council are liable for the control and working of the railway. If the qualification of payment of cess is gone, it is arguable that the members of the committee should be members of the council, since the committee is the mere delegated machinery by which the council carries out its statutory obligation in respect of the railway.

[They referred to *Folkestone Gas Company* v. *Bowden* (1): *Sheffield County Council* v. *Blunt* (2).]

Rearden was not called upon to reply.

CHERRY L.C.J.:

This case raises a question of some importance, which Serjeant M'Sweeny urges, if decided in one way, will cause serious inconvenience to several of our county councils. That may be so, but if it be so, we may regret it, but we cannot help it. Our duty, sitting here, is to administer the law as we find it; we have no power to legislate, nor can we decline to put an enactment in force because, by reason of some inadvertence, inconvenience is caused thereby.

Although certain members of the Kerry County Council were brought before the Court charged with what is technically a penal offence, no one can suggest that they were guilty of any moral wrong; and I cannot help thinking that the situation might have been left as it was. The point, however, is now raised before us, and it is our duty to decide what is the law thereon.

The question in the case arises on Article 12 (4) (*d*) of the Local Government (Application of Enactments) Order, 1898, made in pursuance of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 104. That Article imposes a disqualification with regard to which numerous questions have been raised. It has always been most strictly enforced, and it is right that it should be, so as to exclude from county councils and their committees any person who makes a profit out of the business of the council.

(1) [1914] A. C. 338. (2) L. R. 3 C. P. 484.

K. B. Div. 1915. MORIARTY v. O'DONNELL. Cherry L.C.J.

Article 12 (4) (*d*) provides that "a person shall be disqualified for being elected or chosen or being a member of a council of a county . . . if he . . . holds any paid office or place of profit under or in the gift or disposal of the council." The Tralee and Dingle Light Railway was constructed under the Tramways Act, 1888, and having become a bankrupt property it vested in the grand jury of the county, under the provisions of that Act. By an Order in Council, made by the Lord Lieutenant, dated 22nd June, 1896, it was provided that a committee of management of the railway should be appointed by the grand jury of the county of Kerry. That order directed that members of the committee should be paid each year, as remuneration for their services, a "fee" of £1 each. The order further provided for the appointment of a chairman of the committee at a salary not exceeding £70 a year. The committee could, at its discretion, pay the chairman a sum less than £70, but it had no discretion as to the amounts to be paid to the other members.

Under the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), the control of the railway passed from the grand jury of the county to the county council. They now appoint the committee and pay the salaries and "fees."

The only question in the case is, Is membership of this committee a "paid office" or "place of profit" under the council?

The resident magistrate held that membership of this committee constituted a "paid office" under the council; the other magistrates apparently did not consider this matter, but came to the conclusion that it was not a place of profit, and dismissed the summons upon this ground. A paid office is one thing; a place of profit is another. The definition of "office" in the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), is strongly in favour of the view of the appellants. Section 109 of that statute provides—"The expression 'office' includes any office, situation, or *employment*." "Employment" is a very wide term, and it would seem to me clear that the membership of this committee is an office in the gift of the council within the meaning of this definition. The question of the amount of the payment is not material. I do not think that the magistrates were empowered

to consider the adequacy or inadequacy of the remuneration. If there is any payment made to the holder of an office, the office must be deemed a paid office. *Nell* v. *Longbottom* (1) is an authority for imposing the penalty where any payment, no matter how small, is received. It was argued that this is not a paid office, because the remuneration is called a "fee," but I think that it is immaterial whether the remuneration is called a fee or a salary, where any sum is regularly paid for the discharge of the duties. Reliance was also placed by the prosecution upon the fact that members of this committee were entitled to a free pass over the railway, as indicating that the membership of the committee was a "place of profit" under the council. I prefer, however, to base my judgment upon the cash payments made to the members, and I say nothing as to the effect of this privilege.

For the reasons I have given I am satisfied that membership of this committee is a paid office within the meaning of Article 12 (4) (*d*) of the Local Government (Application of Enaatments) Order, 1898. The decision of the magistrates being, therefore, wrong in law, the case must be sent back to them, to hear and determine in accordance with the law.

BOYD J. concurred.

Solicitors for the appellant: *T. & J. Liston.*
Solicitor for the respondent: *James Murphy.*

C. N. K.

(1) [1894] 1 Q. B. 767.

BLUMBERG *v.* McCORMICK (1).

Appeal.
1915.

(1915. No. 6755.)

Oct. 26.

Practice—Motion for Final Judgment—Part of Claim admitted by Defendant, but amount admitted due not offered to be brought into Court—Motion refused—Amount admitted due subsequently brought into Court with Defence—Appeal by Plaintiff from Refusal of Motion—Appeal a Rehearing—Judgment to be given on State of Facts existing at Date of Rehearing—Proper Order to be made on Motion for Final Judgment where Defendant admits part of Claim and offers to bring amount admitted due into Court—Order XIV, Rules 1, 4—*Order LVIII, Rules* 1, 4.

On a motion for final judgment under Order XIV, Rule 1, where the plaintiff's claim is for a liquidated demand, and the defendant admits part of the claim and sets up a defence as to the balance, the provision in Rule 4 of the Order that in such case the plaintiff shall have judgment forthwith for such part of his claim as is admitted, subject to such terms, if any, as to suspending execution or the payment of the amount or any part thereof into Court by the sheriff, or otherwise as the Court may think fit, does not preclude the Court, if the defendant then and there brings the money into Court to abide the order of the Court, from making no rule on the motion; and in such circumstances the Court should make no rule on the motion, with a provision for the plaintiff's costs.

The plaintiff brought an action to recover the sum of £45, the balance alleged to be due by the defendant on foot of a promissory note for £100. The defendant entered an appearance, and the plaintiff moved under Order XIV, Rule 1, for final judgment. The defendant, in an affidavit filed to resist the motion, admitted that part of the amount claimed was due, and set out facts showing a probable defence as to the balance. He stated that he was willing to pay the plaintiff the sum admitted to be due. On the hearing of the motion the defendant offered to submit to judgment for the amount admitted to be due, if accepted in full satisfaction. The plaintiff declined to accept this offer. The Court refused the plaintiff's motion with costs. The defendant subsequently delivered a statement of defence, bringing the money admitted to be due into Court, and setting out facts showing a defence as to the balance of the plaintiff's claim. After receiving this defence the plaintiff served notice of appeal to the Court of Appeal against the order refusing his motion for final judgment, and asked that he should be declared entitled to judgment for the claim endorsed on the writ, or in the alternative to judgment forthe sum of £15, admitted to be due, with interest.

(1) Before O'Brien L.C. and Ronan and Molony L.JJ.

Held, by the Court of Appeal, that the proper order to be made on the appeal was, that it appearing that, subsequent to the order of the King's Bench Division and previous to the service of the notice of appeal, the defendant had delivered his defence, bringing into Court the amount admitted to be due, there should be no rule on the motion for final judgment, the plaintiff's costs in the Court below to be costs in the cause, and the costs of the appeal to be paid by the appellant.

APPEAL by the plaintiff from an order of Ross J., sitting for the King's Bench Division, refusing the plaintiff's motion for final judgment.

The action was brought by the plaintiff, a registered money-lender, against the defendant, Hamilton Osborne M'Cormick, and Emily M'Cormick, his wife, to recover the sum of £45 alleged to be due by the defendants on foot of a joint and several promissory note made by the defendants in favour of the plaintiff for £100, dated the 22nd October, 1914, payable by five equal monthly instalments of £10 each, the first instalment to be payable on the 4th December, 1914, and the balance of £50 to be payable on the 4th May, 1915. The promissory note provided that in case of default in payment of any instalment, the whole amount, or so much thereof as remained unpaid, was to become immediately due, and payable forthwith. The statement of claim endorsed on the writ of summons alleged that default had been made in payment of the said sum of £50, payable on the 4th May, 1915. The particulars endorsed on the writ credited the defendants with payments on account at different times, amounting in all to £55, leaving £45 as the balance due.

The defendants having entered an appearance, the plaintiff applied for final judgment under Order XIV, Rule 1, upon an affidavit verifying the cause of action, and alleging the sum of £45 to be due. The defendant, H. O. M'Cormick, in an affidavit filed to resist the motion, alleged that the amount lent him by the plaintiff on the 22nd October, 1914, was £70, and that he had since paid the plaintiff a sum of £55, leaving due on foot of principal the sum of £15. The affidavit proceeded: "I say that I am, and have been, willing to pay to the plaintiff the said sum of £15, together with interest on the sum advanced at the rate of £20 per cent. per annum, together with costs of the writ of

Appeal. 1915. BLUMBERG v. McCORMICK.

summons. I say that the other defendant is my wife, and I know that she is willing that the plaintiff should be paid by us the said sum of £15, together with interest at the rate of £20 per cent. per annum, and said costs."

The motion was heard before Ross J. on the 12th July, 1915, and on the hearing the defendants offered to let judgment be marked for £15, if accepted in full satisfaction and discharge of the plaintiff's claim. The plaintiff refused to accept this offer. Ross J. refused the plaintiff's motion, with costs.

On the 21st July, 1915, the defendants delivered a defence which, in addition to general traverses of the cause of action, alleged that the plaintiff was a money-lender at the time when the money was lent; that the interest charged in respect of the sum actually lent was excessive, and the transaction harsh and unconscionable; that the defendants had made payments from time to time, particulars of which were given; and that the amount fairly due in respect of principal, interest, and charges did not exceed £20 16*s.* 4*d.*, being £15 the balance of the amount actually lent, and £5 16*s.* 4*d.* for interest thereon, at the rate of 20 per cent. per annum. The defendants brought this sum of £20 16*s.* 4*d.* into Court, and said that it was sufficient to satisfy the plaintiff's claim. The defendants, by way of counter-claim, claimed to have the transaction re-opened, and an account taken, and to be relieved from payment of any sum in excess of the amount fairly due in respect of principal, interest, and charges.

On the 3rd August, 1915, the plaintiff served notice of appeal to the Court of Appeal, asking that the order of Ross J. should be reversed, and that the plaintiff might be declared entitled to get final judgment for the amount of the claim endorsed on the writ, with costs of suit; or, in the alternative, to enter judgment for the sum of £15 admitted to be due by the defendants for principal, with such sum for interest (if any) as the Court might be pleased to direct, and that the plaintiff might have liberty to proceed for the balance of the claim, and for the costs of the motion and of the appeal.

Leech K.C., and *Barry Meade*, for the appellant:—

The defendant having admitted that part of the amount claimed was due, the plaintiff was entitled to judgment forthwith for that amount: Order XIV, Rule 4; *Lazarus* v. *Smith* (1). On the hearing of the motion before Ross J., there was no offer by the defendant to bring the money into Court, and the plaintiff should not be put in a worse position by reason of the subsequent payment in. The plaintiff is entitled to judgment for £15, subject to the power of the Court to impose terms as to suspending execution or ordering the sheriff to bring the amount levied into Court. The order of Ross J., giving costs against the plaintiff, is clearly unsustainable.

T. J. Campbell, for the respondent:—

The order of Ross J. should not be disturbed. The defendants were always ready and willing to bring into Court the amount admitted to be due, and did so before the notice of appeal was served.

O'BRIEN L.C.:—

This appeal, although only interlocutory, has necessarily taken some time, because the facts are somewhat unusual, and we were pressed by Mr. Leech, in his able argument, with the view that there was some cardinal rule of law and practice which compelled us to give a judgment which, in my opinion, would be a wrong judgment.

The action was brought by the plaintiff, described in the writ of summons as a registered money-lender, to recover a sum of £45, the balance alleged to be due on foot of a promissory note for £100, dated the 22nd October, 1914, made by the defendants to the plaintiff, and repayable by five monthly instalments, with a provision that in case of default in payment of any instalment the whole amount remaining unpaid should become immediately due.

The plaintiff moved for final judgment under Order XIV,

(1) [1908] 2 K. B. 266.

Appeal. 1915. BLUMBERG v. MCCORMICK. O'Brien L.C.

Rule 1, verifying in the ordinary form the amount due as being £45. The defendant, H. O. McCormick, in an affidavit made by him to resist the motion, alleged that the amount lent to him by the plaintiff on the 22nd October, 1914, was £70, on which he had paid a sum of £55, leaving due on foot of principal the sum of £15. He states in his affidavit that the defendants are, and have been, willing to pay the plaintiff this sum of £15 with interest on the sum advanced at the rate of 20 per cent. per annum, together with the costs of the writ of summons.

It being manifest that a defence under the Money-lenders Act might arise as to part of the amount claimed, Ross J. could not possibly have given final judgment for the £45, nor is it seriously contended that he was bound to do so. Mr. Leech, however, relies on the terms of Order XIV, Rule 4, and contends that, the defendant having admitted that £15 was due, the judge was bound to give judgment for that amount, and that in the exercise of his discretion he should have given the judgment with costs. Order XIV, Rule 4, provides that "if it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted." But then comes the provision:— "Subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Court or judge may think fit."

It appears that on the hearing of the motion the defendant offered to submit to judgment for the £15 if the plaintiff would accept this in full satisfaction and discharge of his claim. The plaintiff declined to accept this offer, and Ross J. refused the whole motion with costs. I attach very little importance to this offer of the defendant, since it was coupled with a condition which could not be forced on the plaintiff, and if the matter had remained there, the question would not be at all that which has come before this Court. But the plaintiff's motion having been refused on the 12th July, 1915, the defendant, on the 21st July, delivered a defence, in which, in addition to general traverses of the cause of action, he alleged that the plaintiff was a money-lender at the time when the

money was lent; that the interest charged in respect of the sum actually lent was excessive, and the transaction harsh and unconscionable; that the defendant had made payments from time to time; and that the amount fairly due in respect of principal, interest, and charges did not exceed £20 16*s.* 4*d.*, being £15 the balance of the amount actually lent, and £5 16*s.* 4*d.* for interest thereon at 20 per cent. per annum; and the defendant brought this sum of £20 16*s.* 4*d.* into Court, and said that it was sufficient to satisfy the plaintiff's claim. The defendant also, by way of counterclaim, claimed relief under the Money-lenders Act, 1900. The plaintiff having received that defence on the 21st of July, served notice of appeal on the 3rd of August. That notice, notwithstanding that a defence had been delivered, and this money brought into Court, asks that the order of Ross J. be reversed, and that the plaintiff may be declared entitled to get final judgment for the amount of the claim endorsed on the writ, with costs; or in the alternative, to enter judgment for the sum of £15 admitted to be due by the defendants for principal, with such sum for interest, if any, as the Court may direct, and that the plaintiff be at liberty to proceed for the balance.

Now, Order XIV, Rule 4, no doubt provides that if any part of the claim is admitted the plaintiff shall have judgment for such part; but it further provides, as I have said, that this is to be subject to such terms, if any, as to suspending execution, or the payment of the amount levied, or any part thereof, into Court by the sheriff, as the Court or judge may think fit. The object of the rule is that the Court should be in a position to prevent any injustice to the plaintiff where part of his claim is admittedly due; but the rule does not, in my opinion, contemplate that where that object is effected by bringing into Court the amount admitted to be due, to be dealt with by the Court, and under the control of the Court, the Court is nevertheless bound to give judgment for the amount against the defendant, with the consequence that such judgment may be registered, and serious injury caused to the defendant's credit. Here we have in Court the whole of the £15 admitted to be due for principal, and also the sum of £5 16*s.* 4*d.*, admitted to be due for interest. If the plaintiff succeeds in the action, he will get that money. If, on the other

Appeal. 1915. BLUMBERG v. MCCORMICK. O'Brien L.C.

hand, the defendant succeeds in establishing his defence under the Money-lenders Act as to the balance of the plaintiff's claim, it is right that he should have such protection in respect of costs as is afforded by this money being in Court. Accordingly, I entertain no doubt that if this had been the state of affairs when the case was before Ross J. he should have made no rule on the motion for final judgment; but some order should have been made providing for the plaintiff's costs in case he succeeded in the action.

It has been urged on us, however, that this was not the state of affairs which existed when the order was made by Ross J. But this, though true, does not place Mr. Leech in a position to have an order now for judgment for the £15. An appeal to this Court is by way of re-hearing, and within the limits of the statute and rules we are bound to give such judgment as is just between the parties as of the date of such re-hearing; and therefore we must decide this appeal on the facts as they exist at present.

I think that the more convenient course will be to discharge the order of Ross J., and to make an order showing on its face that we determine the case on the facts now before us, including the payment of the money into Court. We shall accordingly make an order in the following terms:—It appearing that subsequent to the order of Mr. Justice Ross of the 12th July, 1915, and previous to the service of the notice of appeal, the defendant delivered his defence, bringing into Court £20 16*s.* 4*d.*, viz., £15 admitted to be due in the affidavit of the defendant sworn on the 7th July, 1915, discharge said order of Mr. Justice Ross, and in lieu thereof make no rule on the said application, the plaintiff's costs in the Court below to be costs in the cause, and the costs of the appeal to be paid by the appellant.

RONAN L.J.:—

Mr. Leech did not seriously contend that he was entitled to more than a judgment for £15. He said that Mr. Justice Ross was bound by Order XIV, Rule 4, and the decisions on the Rule, to give him this judgment. I think he was, but I think he had power to attach to it the "term" of the payment of the amount levied into Court by the sheriff.

Surely, if the judge had announced his intention of making this order, and the defendant had offered then and there to lodge the amount in Court, no order for judgment would have been given.

If the money had been paid into Court, the plaintiff would have had £15 of his demand in Court, to abide the order of the Court according to the ultimate result of the action.

The contract in this case provided that if the defendant failed to pay the first instalment of £10 on the 4th December, the £100 should become immediately due; that is, that he should pay £30 interest for a loan of £70 for forty-three days. This is less than one-eighth of 365 days; it would, therefore, be more than £240 for the loan of £70 for a year, or at the rate of more than £340 per cent. per annum. If the entire payment had been deferred by the contract for six months, the interest would have been at the rate of 60 per cent.; but if the contract was duly performed, the interest would have far exceeded this sum, by the operation of the monthly payments of £10. There can be no doubt that the contract was such that it was not only possible but probable, if the action went on and the defendant lodged a moderate sum in Court, that there would be a judgment for him with costs which would far exceed the £15.

Under these circumstances, if the defendant had brought the money into Court, I think the proper order to have made on the motion would have been: "The defendant having now lodged in Court £15, the amount admittedly due for principal, no rule on the motion." It would have been an abuse of the rule to have ordered an unnecessary judgment and execution to produce the same result, if the defendant had been willing to do this. But if the defendant refused to lodge the amount, the order should have been for judgment for £15, with a direction to the sheriff to lodge the amount levied in Court.

But what is the position now, and what was the position when the plaintiff served his notice of appeal asking for judgment for the entire amount? He was then, and is now, in a better position than if Ross J. had made what we think the proper order in the case. Mr. Leech asks us for a judgment for £15. I asked him what he wanted it for. He admitted, having regard to our view of the case, that he could not attempt to levy under it. No

Appeal.
1915.
BLUMBERG
v.
McCORMICK.
Ronan L.J.

Court should make an order for an unnecessary and useless judgment. I think, therefore, that we should make the order stated by the Lord Chancellor.

As to the costs, the order seems at first a little hard on Mr. Leech, as he has by his appeal got rid of an order against him for payment of the costs of the motion. However, I think the proper order for costs in the Court below, if the proper order had been made, would have been to have given both parties their costs in the cause. We are not giving the defendant any costs in the Court below, as he did not offer to lodge the money. In the next place, the defendant offered to pay the £20 forthwith; the plaintiff never suggested that it should be lodged in Court. He has failed in the substance of his appeal. I, therefore, agree with the Lord Chancellor as to the costs.

MOLONY L.J. concurred.

Solicitors for the appellant: *Crookshank, Leech, & Davies.*
Solicitor for the respondents: *P. McGinn.*

J. G. T.

CRANE & SONS *v.* WALLIS (1).

(1915. No. 4890.)

Appeal.
1915.
Oct. 27.

Judgment—Irregularity—Setting aside—Action for Return of Specific Goods—No Appearance entered—Judgment for Return of Goods—No Affidavit of Service of Writ filed—Non-compliance with Rules—Order XIII, Rules 2, 8—Order LXXXIX, Rule 1—Ex parte Application—Necessity for utmost Good Faith.

The defendant having failed to enter an appearance to a writ of summons claiming the return of specific goods, the plaintiff applied *ex parte* to a judge under Order XIII, Rule 8, for an order for the return of the goods. No affidavit of service of the writ had been filed as required by Rule 2 of Order XIII. The judge's attention was not drawn to the fact that such affidavit had not been filed, and he made an order for judgment against the defendant for the return of the goods.

Held, that the filing of an affidavit of service was essential to give jurisdiction to make the order; that the non-filing of such affidavit was not a mere non-compliance with the rules which could be remedied under Order LXXXIV, Rule 1; and that the order must be set aside.

The rule is well settled that there must be the utmost good faith on *ex parte* applications.

APPEAL by the defendant from an order of the King's Bench Division made by Kenny J., refusing to discharge an order made by Pim J. under Order XIII, Rule 8, for the return of goods detained.

The plaintiffs had issued a writ against the defendant on the 29th April, 1915, claiming the return of a "Majestic Organ," or its value, and damages for detaining the same. No appearance was entered by the defendant, and on the 29th June the plaintiffs applied *ex parte* to the Court for an order for the return of the organ. The application was grounded on an affidavit of Mr. John H. Wakefield, manager of the plaintiffs' firm in Dublin, filed on the 28th June. The only statement in this affidavit as to the

(1) Before O'BRIEN L.C., and RONAN and MOLONY L.JJ.

Appeal. 1915. CRANE & SONS v. WALLIS.

service of the writ was as follows:—"I refer to the writ of summons issued in this case, and which was served personally on the defendant, George S. Wallis, on Monday, the 10th day of May, 1915, to which writ I am informed by my said firm's solicitors and believe that no appearance has been entered by the said defendant." No affidavit except this had been filed by the plaintiffs. The application was heard by Pim J., who made an order for judgment against the defendant for the return of the organ within two days after service of the order. The attention of the judge was not called to the fact that no proper affidavit of service had been filed.

A copy of the order was served personally on the defendant on the 20th July, 1915, and he applied by notice of motion to the King's Bench Division to have it set aside and discharged for irregularity, on the ground that an affidavit of service of the writ of summons was not filed before the plaintiffs applied for and obtained the order. The application was grounded on an affidavit of his solicitor, Mr. Richard Connolly, who stated that as a result of a search in the office of the King's Bench Division it appeared that no affidavit of service of the writ of summons had been filed. An affidavit in answer was made by the plaintiffs' solicitor, in which he stated that as the defendant was the civil-bill officer for the district in which he resided he sent the original writ and a copy to Mr. Connolly on the 29th April, asking him to have it served on the defendant, and that he received a letter from Mr. Connolly, dated the 11th May, stating that he had served the writ on the defendant himself, and returning the original writ with particulars of service duly endorsed. The application to set aside the order of Pim J. was heard by Kenny J. on the 29th July, 1915, and was refused with costs.

The defendant served notice of appeal to the Court of Appeal, asking that the order of the King's Bench Division of the 29th July, 1915, might be reversed, and the order of Pim J. discharged for irregularity, on the grounds mentioned in the defendant's notice of motion on which the order of the 29th July, 1915, was made.

John O'Byrne, for the appellant:—

The order of Pim J. was made under Rule 8 of Order XIII. But it is a necessary preliminary to taking any proceeding under this Rule that an affidavit of service should be filed as provided by Rule 2 of the same Order, and no such affidavit was ever filed. Order XXXVIII, Rule 9, provides that every affidavit of service shall state "when, where, and how, and by whom, such service was effected, and in case of delivery to any person, shall state that the deponent was at the time of such delivery acquainted with the appearance of such person." It cannot be suggested that Mr. Wakefield's affidavit is an affidavit of service within the meaning of the Rules. The terms of Order XIII, Rule 2, are precise, and the Court has no power to dispense with them: *Ford* v. *Miescke* (1). The judgment here was obtained irregularly, and in such case the defendant is entitled *ex debito justitiae* to have it set aside: *Anlaby* v. *Prætorius* (2). Where proceedings are taken by default there must be at every stage a strict compliance with the rules: *Hamp-Adams* v. *Hall* (3), per Vaughan-Williams L.J., at p. 944. This is a matter *strictissimi juris*: *ib.*, per Buckley L.J., p. 945. In that case the Court held that the omission to endorse the date of service on the writ of summons was not an irregularity which could be waived under Order LXX, Rule 2, of the English rules, corresponding with our Order LXXXIX, Rule 1. The omission to file an affidavit of service is a much graver defect than the omission to endorse the date of service on the writ. In the absence of such an affidavit the Court has no jurisdiction.

The application to Pim J. was made *ex parte*, and his attention should have been called to the fact that no affidavit of service had been filed, in which case he certainly would not have made the order.

F. W. Price for the respondent:—

By Order LXXXIV, Rule 1, non-compliance with any of the rules is not to render the proceedings void, unless the Court or a judge shall so direct. In the present case it is not denied that the

(1) 16 Q. B. D. 57. (2) 20 Q. B. D. 764. (3) [1911] 2 K. B. 942.

Appeal. 1915. CRANE & SONS *v.* WALLIS.

defendant was duly served with the writ of summons, and Kenny J. was right, in the exercise of his discretion under that rule, in refusing to set the judgment aside. If it is set aside now, the plaintiff could file an affidavit of service to-morrow, and make a fresh application to the Court for an order for the return of the organ, to which application there would be no answer. In *Anlaby* v. *Prætorius* (1), Fry L. J. points out that the Court there was not dealing with a mere non-compliance with a rule, and he distinguishes between the case of an irregular judgment and a judgment which, though regular, has been obtained by some slip or error. In the latter case the Court has a discretion as to setting aside the judgment. In *Hamp-Adams* v. *Hall* (2) the decision was on the ground that the result of non-compliance with the rule requiring the date of service to be endorsed on the writ is that there is no writ on which the plaintiff is entitled to proceed : see *per* Vaughan Williams L. J., p. 943. Here there is a perfectly good writ. In *Petty* v. *Daniel* (3), an order for attachment for contempt of Court had been made against the defendant, on a motion, copies of the affidavits in support of which had not been served with the notice of motion as required by the rules. The Court held that it had power under Order LXX, Rule 2, corresponding with our Order LXXXIX, Rule 1, to condone the irregularity, and, being satisfied that a contempt had been committed, refused to set aside the order for attachment. [Ronan L. J. : In *Smurthwaite* v. *Hanway* (4), Lord Herschell says that "If the proceeding is unwarranted by any enactment or rule, it is much more than an irregularity."]

O'BRIEN L.C. :—

The question argued here is one of jurisdiction, and is not a case of merely dispensing with a formality.

Mr. Price has most ably contended that the order of Kenny J. was right, and should not be disturbed. But his argument, although I say without reserve that it has been of the greatest assistance to the Court, does not carry conviction to my mind.

It is perfectly clear that the defendant here has not got any

(1) 20 Q. B. D. 764.
(2) [1911] 2 K. B. 942.
(3) 34 Ch. D. 172.
(4) [1894] A. C. 494, at p. 501.

merits. He got this "majestic organ" from the plaintiffs, and seems to have no right to keep it. If I thought I could decide the case on the basis of doing abstract justice between the parties, I should probably adopt the view of Kenny J.; but where jurisdiction is conferred on the Courts by statutory rules, it is not open to any judge, on the ground of sympathy, or what he may conceive to be abstract justice, to refuse to give effect to those rules where, as in the present case, the jurisdiction can only come into existence if they have been complied with.

The action here was brought for the return of this organ, or its value, and damages for its detention. The defendant failed to enter an appearance. In such case the jurisdiction of the Court to make an order for the return of the article is conferred by two rules, Rules 2 and 8 of Order XIII.

Order XIII, Rule 2, provides that, "Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this Order . . . he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be." Rule 8 of the same Order authorizes the Court, where the claim in the writ is for the delivery of specific goods, and the defendant fails to appear, to make an order for judgment for the return of the goods obtained.

Now the whole jurisdiction of the Court—and I wish to emphasize this—to give judgment against a defendant who has not entered an appearance, is conferred by the rules, and depends on the rules. Counsel for the respondent was obliged to admit this, and that the order of Pim J. was made in supposed obedience to the rules. Apart from the rules, the Court has no jurisdiction to give judgment against a defendant who has not brought himself before the Court by entering an appearance. It cannot be seriously contended that, having regard to Rule 2 of the Order, a plaintiff can take a proceeding under Rule 8 in default of appearance, without filing any affidavit of service at all; and where the rule says that the affidavit is to be filed before the taking of any proceeding, it would be a strong thing to say that it can be filed after taking the proceeding, where the filing is what gives the Court jurisdiction to make an order.

Appeal.
1915.
CRANE & SONS *v.* WALLIS.
O'Brien L.C.

The affidavit to be filed is an affidavit of service, and Order XXXVIII, Rule 9, provides that "every affidavit of service shall state when, where, and how, and by whom such service was effected, and, in the case of delivery to any person, shall state that the deponent was at the time of such delivery acquainted with the appearance of such person." The affidavit on which Pim J. was induced, not of course fraudulently induced, but *per incuriam*, to make the order here, does not contain a single one of those averments; and so far as this procedure is concerned, there might as well have been no affidavit at all, or an affidavit verifying the multiplication table. The affidavit is not made by the person who effected service, but by a Mr. Wakefield, the plaintiffs' manager, who merely states that the writ was served personally on the 11th May, 1915, but does not state where, how, or by whom the service was effected, and does not state that he is acquainted with the appearance of the defendant. Such an affidavit is not merely a non-compliance with the rules, but a defiance of them. As jurisdiction to make the order is conferred only by filing an affidavit of service beforehand, and as such affidavit has not been filed, I am of opinion that this order of Pim J. was made without jurisdiction.

But it is said that the defect can be cured, and reliance is placed on Order LXXXIX, Rule 1, which provides that non-compliance with any of the rules shall not render any proceedings void unless the Court or a judge shall so direct. When an application to set aside the order of Pim J. was made to Kenny J., he thought, influenced, I conceive, by the want of merits on the part of the defendant, that the order could be cured under this rule. But, in my opinion, the filing of the affidavit of service beforehand is what gives jurisdiction. Here no affidavit of service was filed beforehand, or filed at all, and therefore it is impossible for us to say that because possibly the defendant was in fact served with the writ, the non-filing of an affidavit of service was a mere non-compliance with the rules, which can be waived under LXXXIX, Rule 1.

I am of opinion, therefore, that the order of Pim J. was made without jurisdiction, and that Kenny J. was in error in not discharging it.

I think it unnecessary to refer to the cases on the subject, further than to say that to my mind the view we take is confirmed by the passage in the judgment of Lord Herschell L.C. in *Smurthwaite* v. *Hannay* (1), referred to by Ronan L.J. in the course of the argument. Lord Herschell says:—"I cannot accede to the argument urged for the respondents that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX [corresponding with our Order LXXXIX, Rule 1], could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity."

There is a matter on which I wish to say a word. Even if this was not a question of the strictest law, there is a well-settled rule that upon an *ex parte* application there must be the utmost good faith towards the Court. There must be brought before the Court everything material which is known or ought to be known by the solicitor. In this case there was not bad faith, but, *per incuriam*, it was not brought before Pim J. that there had been a total disregard of the rule. Even, therefore, if the Court had a discretion in the matter, the order should, in my opinion, be discharged.

The order of Pim J. and the order of Kenny J. must be set aside with costs.

RONAN L.J.:—

In this case Mr. Justice Pim made an order on an *ex parte* application by the plaintiffs which he never would have made if he had known the fact that there was no affidavit of service filed. It was the duty of the plaintiffs to have called the attention of the judge to this fact, which made it his absolute duty to refuse the application. There is no suggestion that the defendant has taken any step, or done anything, to prevent him from having this order (that should never have been made) set aside. The only mode of doing so was a motion to set it aside. This motion was made, and the order appealed against decides that the plaintiffs are

(1) [1894] A. C. 494, at p. 501.

Appeal. 1915.

CRANE & SONS v. WALLIS.

Ronan L.J.

entitled to retain this order so obtained, and to get from the defendant, in addition, the costs of the attempt to impeach it.

It was the duty of the plaintiffs making this *ex parte* application to have disclosed the fact that the affidavit had not been filed, and in such a case as the present I think that the failure to do this is in itself sufficient ground for setting aside the order with costs.

So far I have not referred to the nature of the order. It was an order for final judgment in default of appearance in the action, and not only that but a final judgment peculiar to Ireland. Jurisdiction to make it is only given by the Judicature rule, Order XIII, Rule 8. In England a similar order can only be made after final judgment in the action (English Order XLVIII, Rule 1); there is no rule corresponding to our Rule 8 of Order XIII. Order XIII deals with default of appearance, that is, orders and judgments against a defendant who has not appeared, and of the application for which he gets no notice. The main, and really the only, protection to people against having judgments marked and orders made against them in actions of which they never heard, is the provision in Rule 2 of the order, that before taking any proceedings in default of appearance, the plaintiff shall file an affidavit of service. In my opinion the rule is mandatory in all cases to which it applies. There is no power given to the Court or a judge to dispense with its requirements, such as is given in Rule 19 of Order IX. Order XIII, Rule 2, applies equally to the marking of judgments by the officers in the offices of the Courts, and to Rules (3), (6), (7), (9), and to an order for judgment by a judge under Rule 8 (the present case). The filing of this affidavit is the fundamental condition of all orders or judgments against a defendant who has not appeared.

In *Hamp-Adams* v. *Hall* (1), Vaughan Williams L.J. says: "Where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage strict compliance with the rules"; and at p. 945, Buckley L.J. says: "Where a plaintiff proceeds by default, every step in the proceeding must strictly comply with the rules; that is a matter strictissimi juris. That has not been done in this

(1) [1911] 2 K. B., at p. 944.

case, and on these grounds I am of opinion that the judgment must be set aside." I respectfully adopt these two statements; they seem to me to dispose of the present case.

As Mr. Price relied strongly on the judgment of Fry L.J. in *Anlaby* v. *Prætorius* (1) I must examine that case a little in detail. The plaintiff marked final judgment in default of defence under Order XXVII, Rule 2. He was not entitled to do so, as the time for defence had not expired. As Lopes L.J., says, at p. 771: "To obtain that judgment was a wrongful act, not an act done within any of the rules. The defendant is therefore entitled *ex debito justitiae* to have it set aside." This applies in terms to the present case. At p. 708, Fry L.J., after giving the dates, says: "The judgment entered on February the 7th was premature and irregular. In such a case the right of the defendant to have the judgment set aside is plain and clear. The Court acts upon obligation; the order to set aside the judgment is made *ex debito justitiae*; and there are good grounds why that should be so, because the entry of judgment is a serious matter leading to the issue of execution, and possibly to an action of trespass." So far the judgments of the two judges are clear. Nothing has been said about the costs of the motion, only that the defendant is *ex debito justitiae* entitled to *the relief* of having the judgment *set aside.* Next, as to Order LXX, Rule 1, Lopes L.J. says: "That rule does not apply here. It was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late; but the present case seems to me altogether outside the operation of Rule 1, because the judgment was entered prematurely, and without any right whatsoever."

What Mr. Price relied on was the passage in the judgment of Fry L.J. immediately following that quoted above:—"We were pressed with the argument that Order LXX, Rule 1, gives a discretion to the Court which applies here. But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entering of judgment *was made independently of the rules; the plaintiff had no right to obtain any judgment at all.* I do not think, therefore, that the case comes

(1) 20 Q. B. D. 764.

Appeal. 1915. CRANE & SONS *v.* WALLIS. Ronan L.J.

within Rule 1, and we must consider what is the right practice without regard to that rule. There is a strong distinction between setting aside a judgment for irregularity, in which case the Court has no discretion to refuse to set it aside, and setting it aside when the judgment, though irregular, has been obtained through some slip or error *on the part of the defendant*, in which case the Court has a discretion to impose terms as a condition to granting the defendant relief. But although the Court is bound to set aside an irregular judgment *ex debito justitiae*, it has always exercised a discretion as to costs, and has imposed terms as a condition to the exercise of that discretion—a common term being that the defendant shall not bring any action." That is to say, that an irregular judgment will always be set aside *ex debito justitiae*, though where the irregularity consists of a slip or error, *on the part of the defendant*, the Court has a discretion to impose terms. But *in any case* the judgment will be set aside.

It is plain that the discretion as to granting the relief only exists where the matter arises through the fault of the defendant. This, Mr. Price, of course, could not admit in the present case. It is fatal to his argument. Where the irregularity arises solely from the plaintiff's acts, *i.e.* when he gets a judgment to which he is not entitled under any rule, the only discretion the Court has is as to the costs of the motion.

Anlaby v. *Prætorius* (1) was decided in 1888, twenty-seven years ago. It has, as far as I know, never been questioned. It has always been quoted in the Annual Practice for two propositions:—1, "The defendant is entitled to have an irregular judgment set aside *ex debito justitiae* without any terms being imposed." 2, "A judgment irregularly signed is not a mere non-compliance with the rules which can be remedied under Order LXX, Rule 1."

It will be observed that there is no statement as to the *costs* of the motion. These are dealt with in the head-note to the case:—"Where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside; and the Court has only power to impose terms on him as a condition

(1) 20 Q. B. D. 764.

of giving him his costs." That is, the Court must set aside the judgment, but they have a discretion as to the costs of the motion; and they may say to the defendant, we must set aside the judgment if you insist on it, but we will not give you the costs of the motion if you do not assent to the following terms. If Kenny J. had set aside the judgment, and on the merits of the case refused the defendant his costs, we should have had a different matter to consider; but here he absolutely refused to set aside the judgment, and not only refused the defendant the costs of the motion, but actually ordered him to pay the costs of the plaintiffs.

In my opinion, the defendant is entitled *ex debito justitiae* to have the order reversed, and the judgment set aside with the costs in this Court.

As to the costs in the Court below, I think the defendant should get these costs on the ground of the non-disclosure already dealt with. I think there is also another ground on which he should get these costs. It seems to me that the only grounds for refusing to allow the defendant these costs would be (*a*) some misconduct or default on his part, or (*b*) a refusal by him to assent to some terms the Court thought reasonable. Neither of these grounds exists in this case. I therefore think the plaintiffs must also pay the costs in the Court below.

MOLONY L.J.:—

I also am of opinion that the order of Pim J. was made without jurisdiction. I regard it as a matter of the greatest importance that in the case of a judgment by default the rules should be strictly complied with.

In the present case the application was made under Order XIII, Rule 8, for an order for the return of specific goods. Jurisdiction under that rule is given only where, before taking the proceeding, an affidavit of service has been filed (Order XIII, Rule 2), because otherwise the Court could be asked to make an order against a man in his absence without any guarantee that the writ of summons had been properly served on him. The affidavit of service must contain the statements

Appeal. 1915.

CRANE & SONS *v.* WALLIS.

Molony L.J.

mentioned in Order XXXVIII, Rule 9, and it could not for a moment be contended that the affidavit used on the present application complied with the provisions of that rule. Consequently we have an order for judgment made without the affidavit having been filed which is made by the rules an essential preliminary to such order being obtained.

It is said that this is a mere irregularity, and that under Order LXXXIX, Rule 1, an irregularity can be waived. But, as was laid down by Lord Herschell L.C. in *Smurthwaite* v. *Hannay* (1), in the passage of his judgment referred to by Ronan L.J. during the argument, if the proceeding is unwarranted by any enactment or rule it is much more than an irregularity. It is unnecessary to refer at length to the case of *Anlaby* v. *Prætorius* (2), which decided that a party is entitled *ex debito justitiae* to have an irregular judgment set aside, or *Hamp-Adams* v. *Hall* (3), where the judgment was set aside because the rule requiring the date of service to be endorsed on the writ of summons had not been complied with.

I am satisfied that if the attention of the learned judge had been drawn to the fact that no affidavit of service had been filed, he would not have made the order. I agree that it was the duty of the plaintiffs' solicitor to bring before the Court everything that was material, and I think that he was bound to have such a knowledge of the rules as would have enabled him to see that the filing of an affidavit of service was an essential preliminary to the application.

Solicitor for the appellant: *Richard Connolly.*
Solicitors for the respondent: *W. G. Bradley & Sons.*

J. G. T.

(1) [1894] A. C. 494, at p. 501.
(2) 20 Q. B. D. 764.
(3) [1911] 2 K. B. 942.

HEALY AND OTHERS *v.* SPILLANE AND ANOTHER (No. 2) (1).

K. B. Div. 1915. June. 17.

Practice—Taxation of Costs—Application to set aside—Case Stated on Hearing of Civil Bill Appeal—Costs taxed to over £10—No Objection taken to Taxing Master's Certificate—Order LIX, Rule 38—Order LXV, Rule 66 (1) (3).

The provision of Order LIX, Rule 38, that in cases stated by a judge of assize under the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, the costs shall not exceed £10, is an absolute prohibition, and is not affected by the provisions of Order LXV, Rule 66 (1), (3), requiring a party dissatisfied with the allowance by the taxing master of items in a bill of costs to carry in before the taxing master an objection in writing within the time therein mentioned, and making his certificate final and conclusive as to all matters not so objected to.

Where, on the hearing of such a case stated, costs were awarded to the plaintiffs against the defendants, and the taxing master taxed the plaintiffs' costs to a sum exceeding £10, and signed his certificate for the amount, the Court, on the application of the defendants, although no objection had been taken by them before the taxing master, declared that the plaintiffs were to have £10 for their costs, and no more.

In taxing costs in such a case the certificate of the taxing master ought, in addition to showing that he has taxed the costs referred to him to a certain amount, show on the face of it that, having regard to Order LIX, Rule 38, he can certify for merely £10 costs and no more.

MOTION on behalf of the defendants to set aside the taxing master's certificate.

The present application was with reference to a special case stated by a judge of assize under the Civil Bill Courts Procedure Amendment Act (Ireland), 1864. The case had been decided by the King's Bench Division in favour of the plaintiffs, who had been awarded costs against defendants (see *ante*, p. 195). A summons to tax was taken out by the plaintiffs, and the bill came on before the taxing master on the 27th April, 1915. He struck out some items and altered others, the amount finally allowed being over £10. No objection as to the principle of taxation adopted was made by the defendants at the time of taxation, and no objection in writing of any kind was carried in before the

(1) Before KENNY J.

K. B. Div. 1915.

HEALY v. SPILLANE (No. 2).

taxing master. On the 30th April, the taxing master signed his certificate of taxation.

Arthur Clery (with him *Henry Moloney*), for the defendants:—

There is no jurisdiction under Order LIX, Rule 38, to award a greater sum than £10 in any circumstances. Our objection is to the whole principle of taxation; therefore the provisions of Order LXV, Rule 66 (1) (3), have no application.

Hungerford (with him *G. T. Daly*), for the plaintiffs:—

No objection was made to the taxation within the time prescribed by Order LXV, Rule 66 (1). The certificate, therefore, is final and conclusive, and there is no jurisdiction to review the taxation under the provisions of Order LXV, Rule 66 (3).

KENNY J.:—

Objections to the taxation of a bill of costs are for the most part conversant with the rulings of the taxing master in regard to particular items of the bill, and Order LXV, Rule 66 (1) (2) and (3) contemplates objections of that character only. If this were a case of that description, the objection would have been delivered late—the certificate would be final and conclusive under sub-rule (3), and the party entitled to the costs might, on production of the order awarding the costs and of the certificate of taxation, have a writ of execution for the amount so certified. But the present is not a case of that description. There is no objection to any particular item in the bill, nor to the ruling of the taxing master in dealing with the items. The objection is, that although the bill has been taxed to over £10, any certificate in pursuance of that taxation must limit the amount recoverable to £10, having regard to the provision of Order LIX, Rule 38, which provides that the costs of the hearing of a special case "shall not, under any circumstances, exceed the sum of £10." That amounts to an absolute prohibition, expressed in very clear language, against the allowance of any greater sum than £10, and in my opinion such prohibition is not affected by the sub-rules of Order LXV, Rule 66, dealing with a substantially different subject-matter. Were it otherwise, the taxing master's certificate would override the express statutory

enactment in Order LIX, Rule 38, and, in contravention of the statute, execution might issue for a sum of costs over £10: Order LXV, Rule 65 (54).

In such a case as the present, I think the certificate of the taxing master ought, in addition to showing that he has taxed the bill as referred to him to a certain amount, show on the face of it that, having regard to Order LIX, Rule 38, he can certify for merely £10 costs and no more.

I shall declare that the plaintiffs are to have £10 for their costs and no more (1).

Solicitors for the applicants: *Moloney & Son.*
Solicitors for the plaintiffs: *A. H. Allen & Son.*

A. E. C.

IN RE RICHARD HAZLETON, A BANKRUPT.

Bankruptcy—Member of Parliament—Annual Payment to—Salary or Income—Attachment—Public Policy—Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *s.* 319—*Bankruptcy* (*Ireland*) *Amendment Act*, 1872 (35 & 36 *Vict. c.* 58), *s.* 51.

The annual payment of £400 to a member of the House of Commons (including an allowance of £100 for expenses), provided for by the Appropriation Acts, is not a salary or income in respect of which, in the event of the bankruptcy of the member, an order can be made under sect. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, for the payment thereof, or any part thereof, to the official assignee.

This was an appeal from an order of Mr. Justice Boyd, sitting as a judge of the King's Bench Division in Bankruptcy, dated the 19th day of February, 1915, whereby it was ordered that the bankrupt, Richard Hazleton, should, out of his salary or income as member of Parliament for the division of North Galway, pay until further order to Alfred George Hollinshead, official assignee of the Court, the sum of £200 yearly in four quarterly instalments of £50 each, to be applied by the said official assignee in discharge of the debts due in this matter.

(1) See to like effect as the foregoing judgment: *Sparrow* v. *Hill*, 7 Q.B.D. 362, 8 Q.B.D. 479; *In re Castle*, 36 Ch.D. 194; *In re Fletcher and Dyson*, [1903] 2 Ch. 688 [Rep.].

Appeal. 1915. *In re* HAZLETON.

Mr. Hazleton was, in the year 1910, elected as a member of Parliament for the division of North Louth, but was unseated on a petition, and ordered to pay the costs of the petitioners, which amounted to £2162 8*s.* 7*d.* He owed no other debts. On the 5th day of June, 1914, Mr. Hazleton was adjudicated a bankrupt on his own petition, and the order now appealed against was made on the hearing of an application by his assignees in bankruptcy, under section 319 of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), and section 51 of the Bankruptcy Ireland Amendment Act, 1872 (35 & 36 Vict. c. 58), for the attachment of the bankrupt's salary or income as a member of Parliament for the division of North Galway, to which seat he had been elected subsequent to the petition.

The bankrupt was admittedly in receipt of payment at the rate of £400 per annum, including an allowance of £100 for expenses, as one of the members of the House of Commons not in receipt of salaries as Ministers, as officers of the House, or as officers of His Majesty's Household.

Henry K.C. (with him *M'Cann*), for the appellant :—

The allowance made to a member of Parliament cannot be attached under any section of the Bankruptcy Acts. It is not "salary or income" within section 51 of the Bankruptcy (Ireland) Amendment Act, 1872. It is merely a voluntary allowance made to a member of Parliament, as such, for the purposes of his membership, and to enable him to perform his duties to his constituency and the country at large. It would be against public policy to appropriate any portion of such an allowance for any other purpose. Nor can it be said that such an allowance comes within the provisions of sect. 319 of the Irish Bankrupt and Insolvent Act, 1857. At the date of that Act payment of members was unknown, and such payments should not be held to be affected by the section in the absence of legislative enactment. The principle of public policy was carefully guarded in section 319, and should not be encroached upon. In *Ex parte Wicks, In re Wicks* (1) the Court of Appeal held that a purely voluntary

(1) 17 Ch. D. 70.

allowance made to a bankrupt was not "income" within the meaning of section 90 of the Bankruptcy Act, 1869. James L.J. there said: "It seems to me that the words mean a salary or an income to which the bankrupt is legally or equitably entitled, and not a mere voluntary payment." No member of Parliament is legally or equitably entitled, as such, to a salary of £400 per annum. The allowance is purely voluntary, resting on nothing more than a resolution of the House of Commons itself. In *Ex parte Webber, In Re Webber* (1) it was similarly held that a voluntary allowance granted by the Secretary of State for India to an officer of the Indian army on compulsory retirement, to which the recipient had no legal claim, was not "income" within the meaning of sect. 53, sub-s. 2, of the Bankruptcy Act, 1883; see also *In Re Saunders, Ex parte Saunders* (2), *Lucas* v. *Harris* (3). *Ex parte Huggins; In re Huggins* (4), will be relied upon by the respondents, but there is no analogy between the pension of a retired judge and a temporary allowance such as this. There is an officer of the House of Commons whose duty it is to make these payments to members when the amount thereof is duly appropriated, but what power would he have to make payment to the assignees? The order for payment is continuous, but even if this allowance be regarded as in the nature of wages earned by the member in respect of his attendance at the House of Commons, it could not be attached. He could not be compelled to continue his attendance: *In re Jones, Ex parte Lloyd* (5); *Ex parte Benwell, In re Hutton* (6); *In re Hurrell* (7); *In re Mirams* (8); *In re Rogers, Ex parte Collins* (9).

Healy K.C., and *Hanna K.C.* (with them, *D. B. Sullivan*), for the respondents:—

We contend that this payment of £400 per annum is strictly "salary or income." No doubt there is no legislative authority for the payment, but when the payment is made, it is paid as salary, and accepted as such. The payments are included in the

(1) 18 Q. B. D. 111.
(2) [1895] 2 Q. B. 117.
(3) 1 Q. B. D. 127.
(4) 21 Ch. D. 85.
(5) [1891] 2 Q. B. 231.
(6) 14 Q. B. D. 301.
(7) 12 T. L. R. 133.
(8) 8 Morr. 59.
(9) [1894] 1 Q. B. 425.

Appeal. 1915.

In re HAZLETON.

estimates for civil services under the heading "Salaries and Allowances." It is not immaterial that £100, portion of the £400, is called an "allowance." If not "salary," the payment when received is "income." Income tax is payable in respect of it. *In re Huggins* (1) is clear authority in our favour. Jessel M.R. there says in reference to the pension of the retired colonial judge: "The word income is as large a word as can be used. It is not the less income because it has to be voted every year by the Colonial Legislature." There the salary was attached, although absolutely protected in India. See also judgment of Eve J. in *In re Elford* (2). Payment of members, however irregular at present, is nothing new. Formerly every knight of the shire received four shillings by the day, and every citizen or burgess two shillings or more, to be levied by the sheriffs; see 35 H. 8 c. 11. By 8 Henry 6, c. 7, it was enacted that knights of the Parliament returned contrary to the ordinance, "shall lose their wages." No privilege attached to such payments. The order of the Court does not require any officer of the House to pay over any sum to the assignees; it merely attaches portion of the money when received by the bankrupt. If the Treasury refused to pay the latter, a mandamus would lie to compel payment, once the money was appropriated: *The King* v. *the Lords Commissioners of the Treasury* (3). When protection is intended to be given to payments of a public nature, it is expressly provided by statute. Thus by sect. 6 of 8 Edw. 7 c. 40, an old age pension is made inalienable. In *In re Doyle* (4) it was held that where the son of an evicted tenant had allotted to him a farm by the Estates Commissioners, his assignees in bankruptcy were entitled to intervene and claim the farm on behalf of his creditors; but this being contrary to the intention of the Legislature, it was provided by sect. 11 of the Evicted Tenants (Ireland) Act, 1907, that lands purchased by an evicted tenant should not be made available in bankruptcy for the discharge of debts contracted prior to the vesting. If it be said that there was no payment of members in 1872, and that the words "salary or income" in sect. 51 of the Act of that year

(1) 21 Ch. D. 85.
(2) [1910] 1 Ch. 814.
(3) 4 A. & E. 286.
(4) [1906] 2 I. R. 538.

could not have been intended to include such payments, our answer is that the same words are to be found in sect. 51 of the Bankruptcy Act, 1914, under which the "salary or income" of a bankrupt may be attached as the Court directs, and no exception is provided for the case of the salary or income of a member of Parliament. The argument based on public policy fails. Can it be said that when an English bankrupt is precluded from sitting or voting in the House, public policy requires an Irish member to be entitled not only to sit and vote, but to receive his salary in full without paying his debts? There is no hardship on the constituency, which can elect a solvent member. Public policy is an unsafe ground for legal decision: *Janson* v. *Driefontein Consolidated Mines, Limited* (1); *Egerton* v. *Lord Brownlow and Others* (2). What is the rule of policy is to be found in the statutes themselves, and when the provisions of these are clear, the duty of the Court is to administer them, not to inquire into matters of alleged public policy. See judgment of Lord Watson in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (3); *Miller* v. *Salomons* (4); *Hardy* v. *Fothergill* (5).

Kenny K. C. in reply referred to *In re Shine* (6); *In re Roberts* (7); *Ex parte Smith*; *In re Angerstein* (8); *Flarty* v. *Odlum* (9).

Cur. adv. vult.

O'BRIEN L.C.:—

The question for decision in this case is important. Mr. Hazleton, having been indebted in a sum of £2162 8*s.* 7*d.*, the costs of an election petition which were awarded against him, was adjudicated a bankrupt in Ireland, on his own petition, on the 5th June, 1914. Prior to that date, viz., on the 26th May, he resigned his seat in Parliament for County Galway. Subsequent to the adjudication, viz., in the month of July, he was again elected a member of the House for North Galway, and the appeal proceeds on the basis that he is at the present time a regularly

(1) [1902] A. C. 484.
(2) 4 H. L. C. 128.
(3) [1894] A. C., at p. 554.
(4) 7 Ex. at p. 560.
(5) 13 A. C. at p. 358.
(6) [1892] 1 Q. B. 522.
(7) [1900] 1 Q. B. 122.
(8) L. R. 7 Ch. App. 662.
(9) 3 T. R. 681.

Appeal. 1915. *In re* HAZLETON. O'Brien L.C.

elected member of the House, and as such entitled to receive certain payments which are provided for members of the House of Commons under Appropriation Acts passed from year to year.

The position of the allowance to which he is entitled, so far as is material, arises in this way:—Since the passing, in the year 1911, of a resolution of the House of Commons (which is, of course, not of statutory force, being only a resolution of that House alone), it was deemed right that in the future provision should be made out of public moneys for payments to the members of the House who were not Cabinet Ministers. Since the passing of this resolution there have been included in the estimates for each year sums of money to provide for the expenses of the House of Commons, including payments to members. Nothing, to my mind, seems to turn on certain differences which were pointed out with regard to the exact terms of the estimates and Appropriation Acts from time to time dealing with them.

The estimates for the year ending the 31st of March, 1915, are typical, and are in the terms most favourable to the respondent, if the respondent is entitled to succeed. The total amount estimated for is £299,448. Under the sub-heading of "Members" there is a sum of £255,500, which was also the amount of the estimate for 1913-1914. There follows an estimate for the salaries and allowances of certain officials of the House, including the department of the Speaker, the department of the Sergeant-at-Arms, and other services.

This allowance to members is calculated on the basis of each member of the House receiving a sum at the rate of £400 per annum. It is paid by cheques, which are drawn by a gentleman who is entrusted with the distribution of this money, and who receives a sum at the rate of £200 per annum for his services. The cheques when presented by each member are duly honoured by the Treasury.

The Appropriation Act which is passed for the purpose of providing funds for these estimates ultimately receives the Royal Assent, having been passed by both Houses.

Mr. Hazleton, so long as he remains a member of the House, *may* receive this allowance. I use the word "may" advisedly. There is no statute of the realm providing for the payment of any

salary to members in general terms, and such right as any member acquires in each year flows in respect of that year only from the Appropriation Act of that year, and unless a further Appropriation Act provides further moneys for him in the next year, he is not entitled to any further allowance. His position accordingly differs fundamentally from that of a person who is in the Civil Service, or who may be permanently entitled to a salary until discontinued, to be discharged from time to time out of moneys voted by the House. He acquires no right save what each appropriation gives to him, and the House of which he is a member may at any time decline to pass an Appropriation Bill providing for an estimate which is to include this allowance.

The words of the estimate undoubtedly, in general terms, refer to the payments to be made at any rate in respect of the year ending the 31st of March, 1915, as salaries and allowances, and it divides up each sum of £400 into two parts, by providing that it is to be payment at the rate of £400 per annum, including an allowance of £100 for expenses.

It is essential, in my opinion, to do what has been done in every case where an application is made under the sections of the Bankruptcy Act dealing with the question in dispute in the present case, viz., to examine into the real nature of the allowance, or salary, or whatever it may be called.

In the first place, as I have pointed out, there is no right to any continuance of it.

In the second place, it arises in no way whatsoever under any contract or agreement. There is no relation of employer and employed between the House of Commons and the member. His duties arise because of the fact that his constituency has sent him to the House of Commons to represent them, both in respect of the general administration of the affairs of the Kingdom, and with regard to such local matters as might affect the constituency. If at any moment, even during the currency of a year in respect of which an appropriation has been voted, he ceases to be a member, he admittedly ceases to have the right to get any allowance; and above all things this money is paid to him not for any prospective work that he may do, but solely in respect of something that has been done, or has happened, prior

Appeal. 1915. *In re* HAZLETON. O'Brien L.C.

to the time for payment. I think that it must be looked at as payment of money to indemnify the member, first in respect of general loss of other means of subsistence caused by his having to attend to his public duties, and, secondly, to indemnify him for the actual expenses which he may have had to incur.

It is all controlled, in my opinion, by this, that it is a sum of money which Parliament has fixed as what in its opinion should represent the proper moneys to be transferred so as to indemnify the member in the manner I have described. To some members it may be an allowance quite superfluous, but Parliament does not concern itself with this; it cannot enter into an inquisitorial investigation of each member's financial position, and it accordingly makes this payment at a rate which it regards to be the fit and proper sum to be paid, and it is paid, as I take it, not only for the purpose of this indemnity, but to ensure that through the indemnity no member of the House may be prevented from discharging the great public duties entrusted to him by the vote of his constituency.

Having expressed my view as to what I conceive to be the general position of this payment, I now approach the sections of the Irish Bankruptcy statutes dealing with the powers of the Court to render available for his creditors the salary or income of a bankrupt.

Prior to 1872, when the Bankruptcy (Ireland) Amendment Act, 1872, was passed, the section regulating matters of this kind was section 319 of the Act of 1857. This section I cannot trace as coming from the English Act of 1849, but it appears in the English amending statute of 1861. By this section it is provided that the Court may order such portion of the pay, half-pay, salary, emolument, or pension, of any bankrupt, as on communication from the Court to the Secretary of War, or the Admiralty, or the Commissioners of Customs and Excise, or the chief officers of the department to which such bankrupt may belong, or may have belonged, or under which such pay, half-pay, salary, emolument, or pension, may be enjoyed by such bankrupt, they respectively may, under their hands, or under the hands of their respective Chief Secretary or other officer for the time being, consent in writing, to be paid to the official assignee, in order

that the same may be applied in payment of the debts of such bankrupt.

Under this section of the Act of 1857 the Court acquired power to make an order for payment of the pay or half-pay, and so forth, as by the section provided; and it would not of course, on the face of it, apply to any cases except those expressly dealt with by the section.

By section 51, however, of the statute of 1872 it is provided that when a bankrupt is in receipt of a salary or income other than is mentioned in the 319th section of the Act, the Court may from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the official assignee or the trustee, to be applied by him in such manner as the Court shall direct.

In the present case Mr. Justice Boyd was of opinion that the payments which might be made to Mr. Hazleton while a member of Parliament fulfilled the condition of being a salary or income, and he accordingly ordered that the bankrupt do pay to the official assignee the sum of £200 yearly, in four quarterly instalments of £50 each, on specified dates, to be applied in discharge of the debts due in this matter.

The arguments in this case on behalf of the appellant were twofold. First, it was contended that this payment was not a salary or income within the meaning of the section; and, secondly, it was contended that, even if it was a salary or income in a technical sense, the judge should not have allocated any portion of it, inasmuch as to do so would be an infringement of public policy, and this view with regard to public policy was pressed in two ways: First, it was suggested that it would infringe public policy if a vesting could take place, and therefore that it did not; and, secondly, it was urged that, even if there was a vesting in the first instance, it would be improper that the judge should, by a prospective order, deprive Mr. Hazleton of moneys which Parliament had measured, or at a future time might measure, as being necessary to be paid to him as an indemnity for loss in the discharge of his duty to the public.

Now although "salary" and "income" are words at first sight of very wide meaning, a series of decisions have been given which

Appeal. 1915.

In re HAZLETON.

O'Brien L.C.

show that they are not used in this section in the wide manner which would appear at first sight to be their possible meaning.

In a text-book which was written a short time after the passing of the English Bankruptcy Act of 1869, it was pointed out that income might be held to include almost any form of money received by a bankrupt; but in the case of *Ex parte Wicks, In re Wicks* (1), the Court of Appeal in 1881 decided that a purely voluntary allowance made to a bankrupt is not income, and that in order that sect. 90 (the section in part corresponding to our sect. 51) should apply, the payment must be one to which the bankrupt has a legal or equitable claim. In that case it appeared that a certain person made annually to a bankrupt an allowance of £200, but not under any legal or equitable obligation. The Chief Judge took the view that so long as it was received it could be nothing else but income, and he made an order under the section, directing that £50 out of every £200 received by the bankrupt should be paid by him to the trustee. Lord Justice James was clearly of opinion that the words meant something to which the bankrupt was legally or equitably entitled, and Lord Justice Cotton describes it as being "something which the bankrupt has a right to receive." The wideness of the words was further restricted by the case of *Ex parte Benwell, In re Hutton* (2), which decided that the word "income" in the Act applies only to an income *ejusdem generis* with a "salary," and does not enable the Court to set aside for the benefit of the creditors of a professional man who is an undischarged bankrupt any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge. The Master of the Rolls says that income must mean income in the nature of a salary (p. 307).

I am perfectly clear that, looking at the real meaning of these payments to the bankrupt, it is impossible to consider that they constitute anything at all resembling a salary; that is to say, a salary within the meaning of that word in sect. 51, having regard to the decisions of the Courts; and the order which was made by Mr. Justice Boyd, on the very face of it, to my mind, shows how fallacious the view is that this can be salary.

(1) 17 Ch. D. 70. (2) 14 Q. B. D. 301.

He, undoubtedly, by the form of his order, assumes that it has one of the great characteristics of salary—namely, that it is paid from time to time, and as a certainty, whereas it is perfectly obvious, as I have already pointed out, that it is not paid from time to time as a certainty, and it in substance comes to this: Parliament may at a future date—say in 1916—authorize the payment of £400 to the bankrupt, but the Court orders that the bankrupt is not to receive it, but is only to receive half of it. At any of those future dates circumstances might arise rendering it absolutely essential that every sixpence of the allowance made by Parliament would be required to ensure the discharge of the public functions by Mr. Hazleton which he has undertaken, and which he is bound to discharge; but the order says, no matter what may be the position of affairs in the future, this money shall not be available for that public purpose.

It is quite true that the Court has power to relax at any time the stringency of an order, but could it ever have been contemplated that the member was to be placed in the position of having to apply to the Court to enable him to obtain the moneys which Parliament had intended to give him, and had fixed as being the proper sum to be paid as his indemnity?

It is sufficient for my purpose to say that I consider this is really only in the nature of an allowance, not constituting a salary; but I wish to add a few words with regard to the other questions argued.

From what I have said as to my view of the position of a member of Parliament with regard to this class of payment, it would seem to me to follow that to capture any part of the allowance by an order operating *in futuro* would contravene public policy, and although I quite agree that this consideration of public policy must be one always approached with great caution, it cannot be disregarded, in my opinion, in considering a question such as arises in the present case. I can conceive nothing more antagonistic to public policy than for the courts to exercise a jurisdiction which, if it can be exercised at all, might entirely over-ride and over-rule the view of the House of Commons with regard to any matter affecting the attendance of its members.

Appeal. 1915. *In re* HAZLETON. O'Brien L.C.

It was argued, and strenuously argued, that public policy cannot now enter into the consideration of such a question, in consequence mainly of a view which the Court of Appeal in England expressed in the case of *Ex parte Huggins* (1). Prior to that case there can be no doubt that it had been uniformly held that if property could not be taken in execution, on grounds that to do so would be a violation of public policy, it did not vest in the assignees, and it was argued that, as the Court decided in that case that the pension of a retired judge of a Crown colony, granted by the Secretary of State, and voted annually by the Legislature of that colony, was income, and did in the first instance vest in the bankrupt, the true test now cannot depend upon this question of assignability in its relation to public policy, and that, accordingly, by implication, all such considerations are got rid of.

During the argument I suggested that this case may not be an authority in Ireland. I wish to say that I doubt whether it is, because the collocation of the sections, and the terms of the sections, of the English Act of 1869, which were relied on by the Court of Appeal in determining the question before them, differ in my opinion very materially from the two sections of the two Irish Statutes; but, whether it is or not, I wish to make it clear that in putting my judgment on the ground I have, I am not to be taken as expressing an opinion that considerations of public policy might not decide this case in favour of the appellant. On the contrary, my opinion altogether leans towards the view that it would be contrary to public policy to hold either that there can be a vesting at all, or that the judge is not absolutely bound to stay his hand when dealing with this particular class of payment, voted and allocated by Parliament for a specific purpose. In my view, it is not essential to decide this question in the present case once I arrive at a decision on the first question, but I must not be understood as having any view against the argument based upon it, as, on the contrary, my opinion is altogether with it.

(1) 21 Ch. D. 85.

O'CONNOR M.R. :—

During the argument there were frequent references to public policy, but I prefer to deal directly with the question, What is the law as made by statute? I would only fall back on public policy as a last resource in aid of the meaning of the statute law if I found it too obscure for independent interpretation. I am convinced of the wisdom of this course by the observations made on the one side and the other on public policy. Each party invoked its aid. Counsel for the appellant urged strongly that it is against public policy to deprive a member of Parliament of the moneys placed at his disposal to enable him to discharge his public duties with ease and efficiency. On the other hand, it was urged by counsel for the respondent with equal force and, as it appears to me, with an equal show of reason, that it is against the policy of the law to allow bankrupts to shelter themselves behind their office and so evade payment of their liabilities. Arguments of this kind only lead us to divergent roads without any reliable finger-post pointing out the true way. I prefer, therefore, to leave aside public policy, as an unsatisfactory subject for judicial pronouncement when the subject in hand is the interpretation of a statute.

There is another question which was discussed during the argument, and which I would also like to avoid, because I can find no certain guide to its solution. It was alleged that the purpose of the payment of members is merely to indemnify them against expenses necessarily incurred in the discharge of their Parliamentary duties. The moderate sum allowed to each member was fairly referred to as bearing out this supposition. On the other hand, it was pointed out that, in the estimates made for the Appropriation Act, each member's payment of £400 was divided into two sums, viz., £300 for salary and £100 for expenses. This distinction makes it difficult to say that the entire payment was intended to be an indemnity allowance and nothing else. Moreover, one would think that, if the payments were only intended to be made as subsistence and travelling allowances, there would have been some difference made between members whose homes were in London, and those who lived in remote

Appeal. 1915. *In re* HAZLETON. O'Connor M.R.

quarters of the Kingdom. The English barrister who can visit the House of Commons on his way from the Middle Temple to his house in Belgravia requires no subsistence allowance. But the Irish member, who crosses the Channel to attend Parliament, has to maintain himself in London, and at the same time to keep up a home for his family in Ireland; he is put to expense which the London resident does not incur. I cannot, therefore, find any satisfaction in the theory of subsistence or indemnity allowance, and I leave this subject, as well as public policy, aside, to come to the Bankruptcy Acts themselves, in order to find out from the language used what is their meaning.

I will deal first with sect. 319 of the Irish Bankruptcy Act, 1857. This section makes available for creditors a portion of the pay, half-pay, or salary of an officer in the public service who has become bankrupt. "Officer in the public service" is not the language used, but there is an enumeration of classes of officers, all in the public service, and if the enumeration is not exhaustive, it is very nearly so. It includes the War Office, the Admiralty, the Customs, and Excise, and every department with a chief officer. It also includes the East India Company. It is possible that in the year 1857, when the Act was passed, an officer in the public service might have been found who did not come within any of the classes specified, but the specification was so wide that it was an evident attempt at being exhaustive, if it was not actually so. The section may then with reasonable accuracy be treated as one dealing with the salaries generally of officers in the public service.

This was the only provision in the Act which made salaries available for creditors in bankruptcy. I will deal afterwards with the question whether they came within the vesting sections, but, whether they did or not, the salaries of public servants could only be touched under the 319th section.

The law remained unchanged until the passing of the Irish Bankruptcy Act, 1872, which enacts by the 51st section that when a bankrupt is in receipt of a salary or income, other than is mentioned in the 319th section of the Act of 1857, the Court may from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the

official assignee. The need for this additional provision in the bankruptcy code is obvious. Machinery had already been provided for making available the salaries of public servants, but none others; and there was no reason why the salaries of private citizens should enjoy an immunity from the bankruptcy law. Each section dealt with a distinct class of salary—the earlier section with that of a public servant—the latter with that of a private citizen. If any larger scope is given to the latter on the ground that there are public servants who are outside the 319th section of the Act of 1857, there arises this anomaly, that the appropriation of the salaries of some public servants is subject to the control of the State as provided by section 319, while the salaries of others are subject to the absolute control of the Court of Bankruptcy. I can find no reason for such a distinction, and this confirms the view that section 319 of the Act of 1857 was regarded by the framer of the Act of 1872 as covering all public servants, as it substantially did; and that sect. 51 was intended to cover a class of salary other than that mentioned in the earlier Act. Now, it may be objected that this construction excludes the salary of a member of Parliament from the operation of both sections—from the 319th section, because it is impossible to fit the case of a member of Parliament into any of the classes therein mentioned; and from the 51st section, because a member of Parliament's salary is a public salary. But this is exactly what one would expect from the fact that when the Bankruptcy Acts were passed the payment of members of Parliament by the State was unknown to English law.

If I am right in the construction I have put on the 51st sect., there is an end of the respondent's case; but if I am wrong in limiting this section to private salaries—if, rightly construed, it has a wider operation, and embraces some public salaries—the respondent must yet fail unless the section embraces the novel salary now payable to an English member of Parliament.

This kind of salary was not in the contemplation of the framers of the Act of 1872, and, if it is to be brought within it, it will be by force of the wide meaning of the words "salary or income." Assume that these words are so coercive as forcibly to drag in the salary of a member of Parliament, then the section

Appeal. 1915. *In re* HAZLETON. —— O'CONNOR M.R.

must read in this way—"When a bankrupt is in receipt of a salary or income, *including the salary or income of a member of Parliament who has become bankrupt, or a person who, having become bankrupt, becomes a member of Parliament before he gets his certificate*, the Court may from time to time," &c. How, I ask, can a section, with such a meaning as this, find a place in an Act which makes bankruptcy a disqualification for a seat in Parliament? Any section bearing such a construction would be repugnant to the 41st and 42nd sections of the Act, which impose Parliamentary disabilities on bankrupts. I am, therefore, driven to the conclusion that the 51st section is not applicable to members of Parliament.

I do not like to leave the case without some reference to the question whether salaries come within the vesting sections of the Act of 1857. Section 267, which vests the personal estate of a bankrupt in the assignees, is no doubt very wide. It embraces all the personal estate of the bankrupt, present or future, and all debts due, or to become due. It might be said that the latter words cover payment on account of salary, whether it be by the month, the quarter, half year, or year. It may be said that the moment the payment falls due it is a debt payable. Does the right to receive payment vest in the assignees? Reading the 267th section by itself, that, perhaps, would be the proper construction. See, however, the result which would ensue. If each monthly, quarterly, or half-yearly salary on falling due vests, as a debt which has become due, in the assignees, the bankrupt earning the salary could not give his employer a receipt for it. The assignees, as the legal owners, should receive it. Now this is absolutely inconsistent with sect. 51, which recognizes the right of the bankrupt to receive the salary until an appropriation order is made. The opening words of the section are:—"When a bankrupt is in receipt of a salary . . . the Court may, from time to time, make such order," &c. So that the bankrupt is treated by the section as the person rightly in receipt until the order is made. This is inconsistent with the previous vesting of the salary in the assignees. It is, therefore, my opinion that salaries are not caught by the vesting sections of the Act of 1857, and if the judgment of Jessel M.R. in

In re Huggins (1) is an authority to the contrary, which I do not think it is, I must respectfully dissent from it.

But really I do not think that we need concern ourselves with the vesting sections of the Bankruptcy Act, because no matter what their effect is, salaries cannot be made available except under the 319th section of the Act of 1857 and the 51st section of the Act of 1872. It is with these sections we have to deal.

For the reasons I have given, I am of opinion that the appeal must be allowed.

PALLES C.B.:—

I am of opinion that the sum of money of which Mr. Hazleton is in receipt is inalienable, and that for that reason the order appealed from ought to be discharged.

In some respects this sum of money is anomalous, and differs from ordinary salaries payable by the State.

As a general rule, subject possibly to occasional exceptions, the *right* of the payee to the payment exists prior to, and independently of, the Appropriation Act; and that Act, in respect of such payments, does no more than provide funds to enable the State to meet, in respect of its pre-existing liability, the sum which shall become payable during the current year.

In the present case, however, no right existed in Mr. Hazleton prior to the Appropriation Act. That Act not only provided the funds to meet the payments, but it created the right in Mr. Hazleton to receive them. At the present moment there is no existing salary payable to him. The sums provided in respect of it by the Appropriation Act of last year have been paid. There is no liability on the State, nor is there any *right* in Mr. Hazleton to receive any future sum in respect of his membership of the House of Commons. The case is one of expectation only, similar to that of a son to receive something from the bounty of his father, not the wholly different one of the *right* to receive a future gale of a well-granted annuity.

This consideration alone would prevent the order of Mr. Justice Boyd being sustained in its totality. It assumes the continuance of the liability of the State to the payment of this annual sum

(1) 21 Ch. D. 85.

Appeal. 1915. *In re* HAZLETON. Palles C.B.

beyond the period for which provision for it was made by the Appropriation Act; in fact, it assumes that future Appropriation Acts conferring new rights shall be made—must be made—by Parliament; and no matter how probable that may be at present, it is dependent on the future will of Parliament, and we have no power to speculate how that will shall be exercised.

As, however, the last Appropriation Act makes provision for the payment of some sums which were not payable at the time of the order of Mr. Justice Boyd, this consideration (if the word "salary" includes the sum in question, a matter on which I do not enter, but as to which I am not to be taken as expressing an opinion contrary to that of the Lord Chancellor) alone would not authorize the reversal of the entire order, and renders it necessary for us to consider the broader objections which have been taken to it.

A member of the House of Commons has public duties of immense constitutional importance to discharge. Upon the discharge of its duties by that House, the working of the entire of our Constitution depends. The discharge of those duties involves the members of the House from time to time journeying to London from their residences, maintaining themselves in London during the entire or part of the sittings of the House, and returning to their homes at the prorogation. The period of his actual attendance in the House is usually dependent to a certain extent on the will and pleasure of the member, but there is a process—a call of the House—which renders attendance compulsory under severe penalties.

The £400 a year in question here is given expressly *virtute officii*. It is not given *nominatim* to one who happens to be a member. It is given to a member under the designation of member. By intendment of law, such a payment out of State funds is given to enable the holder of the office to perform its duties, and support the office with the degree of dignity due to it, and for that reason is by our common law inalienable. Further, in a case such as the present, the amount of the payment depends solely upon the amount fixed by Parliament; and at common law there was not, nor independently of statute is there now, any outside authority which has jurisdiction to say that the amount

fixed by Parliament is too high; that the duties of the office can be discharged and its dignity upheld by the expenditure of a lesser sum; and to declare that the excess is alienable. This proposition, as old as the common law itself, could not be, and, as I understand the arguments, has not been, controverted.

I am quite aware that there are many cases in the books deprecating reliance being placed on public policy; but these have no application to the question of whether the salary of a Government official is alienable or not. In a case like the present, does not sect. 319 of the Bankruptcy Act of 1857 demonstrate that this principle of public policy does apply to Government salaries? Does it not provide that the part made alienable is so rendered alienable only on a condition, the condition of the assent to its alienation being obtained from a member of the particular Government department whose duty it is to protect the principle of the common law that State salaries are required to discharge the duties and to preserve the dignity of the office in respect of which they are paid? I treat, therefore, notwithstanding what has been said, this principle as admitted, and it follows that to sustain the order appealed from it is necessary to show a statute which shall satisfy us that it is the will of Parliament that this elementary incident of a salary payable by the State is not applicable to the sums in question here.

For this purpose one enactment only has been relied on, the 51st section of the Bankruptcy Amendment Act, 1872. Thus the question rests entirely on the construction of that section.

I do not forget that there is also the 319th section of the Act of 1857, which I shall refer to later. But it is impossible that this order should be sustained under that section, as even if this salary were within it—and I am of opinion it is not—the condition precedent has not been fulfilled of the consent of the principal officer of the department having been obtained; and, therefore, I propose to deal first with this 51st section of the Act of 1872.

It enacts, "When a bankrupt is in receipt of a salary or income other than is mentioned in the 319th section of the said Act [meaning the Irish Bankruptcy Act of 1857], the Court may, from time to time, make such order as it thinks just, for the payment of such salary or income, or of any part thereof, to the

Appeal. 1915. *In re* HAZLETON. Palles C.B.

official assignee or the trustee, to be applied by him in such manner as the Court shall direct; and thereupon such portion of such salary or income as shall be specified in such order shall be paid to such official assignee until the Court shall make order to the contrary."

The question is whether this section applies to salary or income in respect of a public office payable out of moneys provided by Parliament.

To solve this question it is necessary to consider carefully the 319th section of the Act of 1857, not only because it is referred to in the section under construction, but because the state of the existing law when a statute is passed is one of the primary matters to be considered in determining the construction of the statute.

This section, which seems to be the first general enactment affecting in this country the inalienability of State salaries, is very carefully worded, and shows that at that time the question of the alienability of such salaries was fully considered.

It authorizes the Court of Bankruptcy to order a portion of the pay, half-pay, salary, emolument, or pension of the bankrupt to be paid to the official assignee until order to the contrary. But what portion? The portion to be paid is not to be fixed by the Court of Bankruptcy, but it is to be such portion as the chief officers of the department to which the bankrupt may belong, or may have belonged, shall consent to in writing. The words are "such portion as on communication from the Court to the Secretary of War, or the Admiralty, or the Commissioners of the Customs or Excise, or the chief officers of the department to which such bankrupt may belong, or may have belonged, or under which such pay, half-pay, salary, emolument, or pension may be enjoyed."

Thus there is shown on the face of the section that the intention of Parliament is to alter the rule of the inalienability of the salary of any person in any department of State, except possibly the head officer of the department, whose salary could not be interfered with except by himself; and the alteration authorized is one which does not affect the common law rule which made it inalienable, for it requires the consent of the person most competent

to determine whether the order would leave a sufficient residue to ensure the performance of the duties of the office and to uphold its dignity.

The "department" referred to in section 319 is plainly a department of State, and the words following the enumeration of the officers of the Army, Navy, Customs, and Excise, "chief officers of the department to which such bankrupt shall belong," extend the section to employees of all Government departments in addition to the Army, Navy, Customs, and Excise.

Bearing in mind these two matters—first, that the subject-matter of the section is the pay of persons in all Government departments; secondly, that to an order under the section the consent of the head of the department is essential—let us come to the 51st section of the Act of 1872.

There is a marked distinction between it and the 319th section of the Act of 1857. The 319th section shows on its face an intention to interfere with the common law principle, and does interfere, subject to a condition. The first observation in contrasting the two sections is that no such intention appears on the face of the 51st section. The word "salary" would be fully satisfied by "salaries" from non-state sources; and "income" it is well settled means income *ejusdem generis* as "salaries," and therefore would be equally satisfied by income from non-state sources.

Next, it is to be observed that there is expressly excluded from the section the subject-matter of section 319 of the former Act, a section which I agree with the Master of the Rolls in thinking was one that was intended by Parliament—and I myself rather think it did effect that intention—to include all State salaries.

Again, the absence of any provision in section 51 requiring the consent, or even knowledge, of the chief officer of the department to the amount to be mentioned in the order, affords a strong argument that it was not intended to include in this section salaries payable by the State, if any of these were not within section 319 of the Act of 1857.

Salaries included in section 319 of the Act of 1857 are expressly excluded from the operation of section 51 of the Act

Appeal. 1915.

In re HAZLETON.

Palles C.B.

of 1872; and if, notwithstanding that exception, the latter section be held to apply to some particular State salaries because they happened to be not included in section 319, then the result would follow that the latter Act of Parliament, although refusing on the face of it to interfere with the provisions of section 319, and leaving the bulk of Government salaries alienable only with the consent of the chief officer of the department, would render alienable the excepted Government salaries not within section 319, which up to that time were wholly inalienable, and that not upon the condition mentioned in the 319th section, but without any exception or condition, thus leaving them at the mercy of the Court of Bankruptcy. I could not hold that by implication and in the face of the express intention appearing in the Act.

Upon the whole, then, having regard to the express exclusion of the salaries mentioned in sect. 319 of the Act of 1857, and to the absence of any provision for leaving in the State any power of safeguarding a sufficient portion of the salary to ensure the due discharge of the duties, I am of opinion that a salary payable by the State is not within sect. 51 of the Act of 1872.

It is not in strictness necessary to consider whether the case is within sect. 319 of the Act of 1857, because, as I have said, even were it within it, as the consent required by the section has not been obtained, the order could not be sustained under it; but as I entertain a clear opinion upon this question, it may be better, to prevent further useless litigation, that I should express it.

So far, I have dealt with two classes of cases, one within sect. 319 of the Act of 1857, and the other within sect. 51 of the Act of 1872. Assuming that sect. 319 of the first Act is not, as I believe it to have been, wholly exhaustive of salaries at the time payable by the State, is the present case within that small exception which would, if excluded from the Act of 1857, and if I am wrong in the construction of the Act of 1872, bring it within the 51st section of the latter Act?

The sum in question is payable to Mr. Hazleton under a new procedure initiated a few years ago, which revives with modifications the old practice of payment to members of the House of

Commons which long since had fallen into desuetude, and the statutes authorizing which had been repealed.

That practice was a common law one, but it was recognized and confirmed by statutes of which the latest was the 25th Henry 8, c. 2, by which it was applied to the newly enfranchised shires and towns in Wales and Monmouth. Under it a sum of 4*s.* a day for a knight of the shire, and 2*s.* a day for a citizen or burgess, was payable to each member of the House of Commons, during the session of Parliament, by the constituency which he represented. It was recoverable under a writ *de expensis levandis*, directed to the sheriff, whose duty it was under severe penalties to levy it from the constituency. These sums of 4*s.* and 2*s.* a day, although small as we now reckon money, were, in the reign of Edw. 2, when they were fixed, very substantial.

The present payments to members differ from those of ancient times by being payable, not by the constituencies directly, but out of moneys provided by Parliament itself.

Both, however, of these classes of payments agree in this, that they are payable to the members themselves *virtute officii*. I entertain a strong opinion that these sums are in no sense payments to servants of the Crown, or to members of a department of State within the meaning of sect. 319 of the Act of 1857. A member of the House of Commons is, as is the House itself, a part of the State itself in its legislative capacity. In my opinion there is no person who, in respect of members of the House, answers the description of chief officer of the department to which the member belongs.

Neither the House of Commons nor its members, as members, are servants of the Crown, which means servants of the King. It is an independent House and part of the Legislature. I am of opinion that the effect of the modern procedure has been to create a property in these sums of money, which is a grant to part of the State itself, which in its very nature is inalienable, which is not within the 319th section of the Act of 1857, and which is not within the 51st section of the Act of 1872, the existence of which could not have been dreamed of in the year 1857 or 1872, when these Acts were respectively passed, and that the old common law principle of non-alienability applies to it.

Appeal. 1915. *In re* HAZLETON.

For these reasons I am of opinion that the order of Boyd J. should be discharged.

Solicitor for the appellant: *W. V. Seddall.*
Solicitors for the respondent: *J. L. Scallan & Co.*

R. ST. J. C.

Appeal. 1915.

June 11, 14, 25.

ALLEN & SONS *v.* KING.

DAVID ALLEN & SONS, BILLPOSTING, LIMITED, *v.* KING (1).

(1914. No. 10,617.)

Licence— Revocation— Assignment of Subject-matter to which attached— Refusal by Assignee to continue Licence—Breach of Contract by Licensor —Licensee's Right of Action against Licensor—Demise or Licence— Easement in Gross—Qualification to Doctrine of Tulk *v.* Moxhay.

By an agreement, not under seal, entered into on the 1st July, 1913, between the defendant, described therein as "the licensor," and the plaintiffs, described as "the licensees," the defendant gave to the plaintiffs permission to affix posters and advertisements to one of the walls of a picture house proposed to be erected on his property by a company about to be formed, for a term of four years, from the 1st November, 1913, or the first day the picture house should be opened for business, at a rent of £12 per annum. The agreement provided that the licensor should not, while the agreement remained in force, permit any other person to affix advertisements to the said walls, and would, if required by the licensees, take proceedings against any person who might, during the continuance of the licence, affix any advertisements to the said walls.

An agreement for a lease of the site, dated the 29th August, 1913, and made between the defendant and a trustee for the Picture House Company, provided that the defendant should assign to the trustee for the company his interest under the agreement of the 1st July, and that the trustee should, as soon as the company should be registered, obtain the ratification by the company of the said agreement.

On the 2nd September, 1913, the Picture House Company was registered, with articles of association containing a provision for carrying the agreement of the 29th August into effect; and at a meeting of the directors on the 13th September, 1913, the agreement of the 29th August was ratified and adopted. On the same day the lease from the defendant to the Picture House Company was executed. It contained no reference to the agreement of the

(1) Before O'BRIEN L.C. and RONAN and MOLONY L.JJ.

1st July. The Picture House Company having refused the permission granted by that agreement, the licensees brought an action for damages for breach of contract against the licensor.

Held, by the Court of Appeal, affirming the decision of the King's Bench Division (*ante*, p. 213), that the agreement was for a licence to continue for four years, and did not operate as a demise of any interest in land, and that as the defendant, by the execution of the lease to the Picture House Company, had put it out of his power to fulfil his obligations under the agreement, there was a breach of contract by him for which an action lay.

Held, also, that there was no obligation on the Picture House Company to give effect to the agreement.

An easement must be connected with a dominant tenement. There cannot be an easement in gross.

The doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774, that an assignee of land, taking with notice of a restrictive covenant, is bound in equity by such covenant, does not apply if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into.

APPEAL by the defendant from the decision of the King's Bench Division, reported *ante*, p. 213, where the facts are fully set out. For the purposes of the present report they sufficiently appear in the head-note. The agreement of the 1st July, 1913, was in the following terms:—

MEMORANDUM OF AGREEMENT made the 1st day of July, 1913, between William King, of Belcamp House, Raheny, Co. Dublin (herein called the Licensor), of the one part, and David Allen and Sons, Billposting, Limited (herein called the Licensees), of the other part, whereby it is agreed as follows:—

1. The Licensor hereby gives the Licensees permission to affix bills, posters, and advertisements to the flank wall at side of picture house proposed to be erected at Royal Canal Bank and Madras Place, Dublin, for a term of four years, from the 1st day of November, 1913, or the first day said picture house shall be opened for business, whichever shall first happen, thereafter terminable by either party giving to the other six months' notice in writing from any of the gale days hereinafter mentioned.

2. The Licensees will pay for such permission a rent at the rate of twelve pounds per annum, payable, so long as this licence remains in force, half-yearly on every 1st day of May and 1st day

Appeal. 1915.

ALLEN & SONS *v.* KING.

of November, the first payment of said rent to be made on the 1st day of May, 1914.

3. The Licensor agrees to give the refusal of any other sites he may be desirous of letting for advertising purposes at reasonable and proportionate terms to the Licensees.

4. The Licensor agrees not to terminate this agreement with the object of handing over said site to any other firm for advertising purposes.

5. The Licensor shall not, while this remains in force, license or permit any other person or persons to affix any billposting or advertisement to the said flank walls or any part thereof, and will, if required by the Licensees, take proceedings against any person or persons who may, during the continuance of this licence, affix any billposting or advertisement to said flank walls, the Licensees indemnifying the Licensor against any costs or expenses connected therewith. Provided always that the said posting of wall shall not extend to any point along the Royal Canal Bank measured 16 feet from the front wall of the said picture house to be erected at Madras Place, and shall not be erected in height to a greater extent than the eaves of the said picture house about to be built.

The Solicitor-General (*James O'Connor K.C.*), *Herbert Wilson K.C.*, and *Lardner*, for the appellants.

Henry K.C., *Brunskill K.C.*, and *J. Whitaker*, for the respondents.

The nature of the arguments sufficiently appears from the judgments.

O'BRIEN L.C.:—

As has been frequently said during the argument of this case, the first thing to do is to construe the document of the 1st July, 1913, and form upon it a conclusion as to what the parties intended. Did they intend in respect of the premises which are mentioned in it to create anything more than a licence? or did they intend to create an interest in the lands? Once that question is solved, I do not think that the case presents any real difficulty.

Although there may be some slight difficulties of construction, I am satisfied that this document amounts to nothing more than a licence, and that it never was intended by the parties to it to be anything else, although it may contain some words which possibly at first sight create ambiguity.

The parties are described as licensor and licensee, and in every clause this description is followed. All that is granted is a permission to affix bills, posters, and advertisements on the flank wall of a picture-house, which at the date of the agreement it was contemplated might probably be erected on the land, which at that date was vested in Mr. King. This permission is certainly to bind Mr. King for four years, and what is called a rent of £12 per annum is to be paid by Messrs. Allen & Co., who surrendered a then existing contract containing a licence to post bills on the then existing premises, and in which contract it was assumed they had an interest. It was further assumed that the licensor would have the power to make good his contract if the picture-house should in fact come into existence, with a flank wall at the side, as mentioned in the document. For this permission the plaintiffs, as I have indicated, bound themselves to pay a sum to King at the rate of £12 per annum, and he bound himself not to permit any other person, except the plaintiffs, to affix posters on the flank wall. This is the whole agreement. It does not in any way purport to demise the flank wall, or any other part of the premises in their then existing state, or any part of the picture-house to be erected. In truth, looked at as a commercial document, irrespective of technicality, the difficulty I find is in considering it to be anything else than what the parties themselves called it—a licence —and not a demise of the land.

Paragraphs 2 and 3 of the agreement, coupled with the fact that a term of years is mentioned in paragraph 1, constitute the only provisions I can see which could give colour to the argument that it was a demise. But the fact that periodical payments were to be made, and that the periodical payments were called a rent, does not seem to me necessarily to convert this document into anything else than what the parties themselves called it; neither do the words referring to other sites and letting of them carry the case further with regard to this site. I should hold this,

Appeal. 1915. ALLEN & SONS v. KING. O'Brien L.C.

apart from authority, but I think that this case is very much stronger in favour of the plaintiffs' construction than any of those in which ambiguous documents have been held to be licences and not leases. *Daly* v. *Edwardes* (1) is the most important, because it is a decision of the House of Lords. It came originally before Kekewich J., and subsequently before the Court of Appeal. The document in that case purported to grant the free and exclusive licence and right to the use of all refreshment-rooms, bars, smoking-rooms, wine-cellars, &c., in Daly's Theatre, together with the free right of access thereto, and also the sole and exclusive privilege of advertising therein, to hold the premises for the term of fifteen and three-quarter years; the grantor was described as the landlord, and power was given to him to determine the term on the non-payment of rent, and there was a covenant that the tenants (so called) should peaceably and quietly "hold, occupy, and enjoy the hereditaments and premises without any lawful let, suit, trouble, eviction, or disturbance by the landlord, or any other person." Notwithstanding a superficial resemblance to a demise of land, both Mr. Justice Kekewich and the Court of Appeal held this document to be a licence only, and the reason in outline was that although the words "demise," "rent," and so forth were used, and although these words from a conveyancer's point of view, without considering what the real substance of the agreement was, might be held to be the granting of an interest or an estate in some part of the theatre as land; yet that, taking the document as a whole, nothing but a licence was intended, and, as Lord Justice Williams said, "Although the lawyers have chosen to dress up this grant of a licence, or this grant of a privilege, in the dress of a lease of land, yet when one comes to look closely at the provisions of the document, it is plain that it is really a grant of a privilege and licence, merely masquerading as a lease." In the case before us even those words could not be used as descriptive of the contract; so far from the draftsman trying to dress up what seems to be essentially a licence in the garb of a lease, he seems to have been at pains always to describe it as a licence.

(1) 82 L. T. R. 372; 83 L. T. R. 548. In the House of Lords, 85 L. T. R. 652, *sub nom. Edwardes* v. *Barrington.*

There is not even in the present case, as it seems to me, that "beautiful confusion of thought and language by the gentlemen who have contrived them which was calculated to create the difficulties which all the judges who have had to deal with this matter have expressed," as Lord Halsbury said in the case of *Edwardes* v. *Barrington* (1). In that case he refers to the covenant for quiet enjoyment as being the strongest point in favour of the view that the document was intended to be a lease, but even that he held not to be conclusive, when the real intention of the parties was ascertained from the whole frame of the deed, and in the present case we are not in any way confronted with this difficulty. The other cases which have been cited both here and in the Court below, namely, *Wilson* v. *Tavener* (2), *Smith* v. *Lambeth Assessment Committee* (3), and *Waugh* v. *London County Council* (4), are also useful in considering how one should approach a document of this kind. I repeat what I have already said, the difficulty which affected me during the whole course of the argument was not to find that this was not a licence as distinguished from a letting of any part of the premises, but that it could possibly be anything else.

I should wish, however, not to conclude without referring to one matter. It was suggested that this might be a lease, by force of the provisions of The Landlord and Tenant Act, 1860, of an easement. I have made it clear that I do not think it is a demise at all, and I decline to consider, so far as this Court at any rate is concerned, that there could be such a thing as a demise or grant of an easement in gross; I did not take the Solicitor-General as pressing this view at all, indeed he expressly disclaimed such view.

If, then, this be a licence, the next question is, What was the effect of the lease which was made by Mr. King to the picture-house company? It is on the face of it a demise of all the premises at a rent of £117 a year. There is no reference to this agreement between Messrs. Allen and Mr. King in the lease; it in no way seeks to bind the lessees by that agreement, and if, as I conceive it to be, the agreement amounted to a licence only, the lease must have the effect of rendering that licence, so far as Messrs. Allen

(1) 85 L. T. R. 652.
(2) [1901] 1 Ch. 578.
(3) 10 Q. B. D. 327.
(4) 88 L. T. R. 689.

Appeal. 1915. ALLEN & SONS v. KING. O'Brien L.C.

are concerned, absolutely worthless. If the document is to be treated as a licence, I do not think it was seriously contended by the appellants, or indeed contended at all, that, so far as the lease itself is concerned, a more effective means could be devised by which Mr. King put it out of his power himself to give effect to the contract which he had made that Messrs. Allen were to have the right of posting bills upon a wall to be built on the premises. In order, however, to get rid of liability on Mr. King, it was argued that the document in some way or another bound the cinematograph company, and that, as it bound them, the remedy of Messrs. Allen was against the company, and that Mr. King had ceased to be in any way liable. I cannot see, once this is a licence only, how there can be any liability on the company, and I agree with the argument which is presented here that this flows from two independent considerations. First, in so far as any right could be claimed through King, it must be admitted, since the case of *North Sydney Investment and Tramway Company* v. *Higgins* (1), that the company could not, by the adoption or ratification of a contract made before its formation between persons purporting to act on its behalf and the vendor, incur any contractual obligation to the vendor, and consequently through him to those upon whom it conferred rights. That is the present case. The company took the lease, but they never in any way adopted this agreement by any new contract; they never claimed the benefit of the £12 a year; and they absolutely repudiated the obligation sought to be cast upon them to permit the side wall of the premises to be used to post bills as contemplated by the agreement. That seems to me, on authority, to put an end to the suggestion that Mr. King was released because there was a liability on the cinematograph company claiming through him as licensor. Secondly, it appears to me that had they not been a company registered under the Companies Acts, but private individuals, once I am of opinion this is a licence, the principle of *Coleman* v. *Foster* (2) and the other cases cited shows that so far as they are concerned the licence was at an end once the lease was executed.

(1) [1899] A. C. 263. (2) 1 H. & N. 38.

Appeal.
1915.

ALLEN & SONS v. KING.

O'Brien L.C.

It was contended that the company was bound and King released because the licence was an integral part of the agreement between King and the company; that this must be regarded as an agreement creating an interest in land in the nature of a restrictive covenant; and that on the principle of *Tulk* v. *Moxhay* (1) the Company in taking the lease incurred the obligation, and, further, that King and Allen & Sons only contemplated a burden on the Company. As I consider this to be a licence only, not creating an interest in land in this or any other sense, such principle cannot apply; and so far as the contract between King and Allen & Sons is concerned, I cannot hold, in the face of the words of the document, that King was to be free from liability if the Company refused to recognize the licence.

Divest the case of mere technical phraseology, and the matter may, I think, be stated thus. King contracted to give a licence to Allen & Sons to post bills for four years. He was bound to keep his contract; he is asked to fulfil it. His answer is, I refuse, because I have put it out of my power to do so. Surely an action lies against him. That, I think, was the principle of *Kerrison* v. *Smith* (2), and the old case of *Smart* v. *Jones* (3), referred to by Mr. Justice Dodd, who has, I think, in this particular, accurately stated the law as I consider it to be. And I also agree with him that this is the simple way to look at the situation; but I do not consider it necessary to enter into the question would there be a remedy against King if there was some remedy against the company, for the simple reason that I am satisfied there is no remedy against the company.

What then is the position of Mr. King? The action of the Company may be reprehensible or not, but that cannot affect the result of the law as I conceive it to be. I cannot see that they did anything which would bind them to give effect to what I have come to the conclusion is a mere licence not coupled with any interest in the land in respect of which it was to be exercised. If the plaintiffs here are not entitled to proceed against the picture company, and could not possibly succeed in an action

(1) 2 Ph. 774.
(2) [1897] 2 Q. B. 445.
(2) 15 C. B. (N. S.) 717.

Appeal. 1915. ALLEN & SONS v. KING. O'Brien L.C.

against them, and if Mr. King has no means that I can see of compelling the company to carry out this personal licence of his, it would seem to follow almost as a matter of both good sense and law that he must remain liable. I think he is liable. When he deprived himself of the power to fulfil his obligation to the plaintiffs by the demise of the lands to the cinematograph company, it seems to me that he determined the licence by an act most effective for that purpose; and, for the reasons I have given, a cause of action then arose, and still subsists. I think this case is unaffected by the questions at issue in *Wood* v. *Leadbitter* (1), and *Hurst* v. *Picture Theatres, Ltd.* (2), because I deal with this as a matter of personal contract only.

I have also abstained from considering many topics which were considered by the learned judges below, and on which they expressed opinions. This case both below and here wandered off into so many legal by-ways that I think it inconvenient and not necessary to follow them, but I wish to guard myself as to accepting or adopting many of the views as to these questions, which I do not think arise, which are discussed in the judgments of Mr. Justice Gibson and the judges in the King's Bench Division.

I sincerely, and without any reservation, confess to being somewhat fearful that, the case appearing to me to be so clear and really simple, I must be wrong having regard to the immense amount of very learned argument which was addressed to us on this appeal, and I am glad to think, as I understand to be the fact, that I shall be corrected by a higher tribunal on appeal if I should be wrong.

RONAN L.J. :—

The document on which this action is brought is neither a conveyance nor a grant, nor "a licence," though it is a contract to grant a licence. One might as well call a contract for the grant of an estate a deed of grant. I think a great deal of confusion has been brought into the case by speaking of the instrument as "a licence" *only*, and then referring to the questions which arise

(1) 13 M. & W. 838. (2) [1915] 1 K. B. 1.

in actions of trespass between the grantor and grantee, as to whether the licence was revocable or not.

The document is what it calls itself, "Memorandum of Agreement"; and I quite agree with Dodd J., that the action is simply a common law action for damages, and should be approached and dealt with solely as such.

A great deal was said about *Hurst's Case* (1), and the licence being irrevocable. All this, with great respect to the judges in the Court below, appears to me to be immaterial in the present case. *Wood* v. *Leadbitter* (2) decided—1, that in an action of trespass a revocable licence cannot be relied on as a defence, although its revocation may be a breach of contract; 2, that the *only* remedy of the licensee is an action for damages for breach of the contract. *Hurst's Case* (1) overruled the former proposition, as applicable to that case. No case ever suggested that where the revocation was a breach of contract, the action for damages would not lie for the breach. The only question in the two cases was the effect in an *action of trespass between the parties*, and it is only in such cases that the question as to whether the licence is irrevocable arises. The action for breach of contract arises equally whether it was irrevocable or not for the purposes of an action of trespass.

Probably the most specific authority for the present action is the passage at p. 850 of the judgment in *Wood* v. *Leadbitter* (2), dealing with *Wood* v. *Lake* (3), which is identical with the present case. As, however, *Hurst's Case* (1) was so fully discussed, I may be permitted to say that the decision in *Wood* v. *Leadbitter* (2) seems to me the necessary result of the principle of the common law,—that the Court never compelled a party to perform, or prevented him from breaking, his contract. It had no jurisdiction to do so. "The law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and, therefore, *free to break his contract if he chooses*" (Holmes on the Common Law, at p. 301). A decision the other way would

(1) [1915] 1 K. B. 1.
(2) 13 M. & W. 838.
(3) *Ib.*, p. 848, note.

Appeal. 1915. ALLEN & SONS v. KING. Ronan L.J.

have amounted to preventing the defendant from breaking his contract.

It would appear to me that, even at the present day, where a licence is incidental to a contract which the Court would not compel the party to perform by specific performance or injunction, *Wood* v. *Leadbitter* (1) would still apply, and that the rights and remedies under the licence cannot be greater than those under the contract to which it is incident.

The real question in this case is, What is the true construction of the contract? As to the object of the parties, what a bill-sticking firm wants is—1, an *exclusive continuing permission* from the owner of premises to fix the bills on the premises; 2, the power of preventing other bill-stickers from putting bills there. These are the main objects. They do not want to purchase an easement, an interest in land, to be carried out with investigation of title, and a formal conveyance with covenants of title. Neither had the defendant the least intention of anything of the kind. Both parties only intended a continuing permission. If there was any doubt of this, the agreement puts an end to it. From beginning to end, it deals with "licence" only, and even if such an easement could be granted, it plainly was not intended.

The main objects are carried out by clause 1 of the contract, which provides for the continual permission for four years from the 1st November, 1913, and by clause 5, which provides thus:—"The licensor shall not, while this remains in force, license or permit any other person to affix any bill . . . to the wall, and will, if required by the licensees, take proceedings against any person who may during the continuance of this licence affix any bill" to the wall. The date of the contract was the 1st July, 1913. Prior to the 1st November, 1913, when the performance of the contract was to commence, viz., on the 13th September, 1913, the defendant by deed made an absolute lease of the premises for forty years from the 1st August, 1913, to the cinema company, and thereby put it *absolutely out of his power*—1, to give any permission to the plaintiff in respect thereof; 2, to prevent any other person from posting bills; or 3, to sue any such person for so doing.

(1) 13 M. & W. 838.

I need hardly refer to *Frost* v. *Knight* (1) as an authority for the proposition that "where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil it, an action will *at once* lie," and a fortiori it will lie after the time for performance. This proposition was not, and cannot, I think, be disputed. If so, there was a clear breach of contract for which the action lay.

The defence really was that the true construction of the contract was, that none of these obligations were real obligations, that they were intended to be mere shams, and that the only obligation on the defendant was that he would neither commit nor authorize any act of interference with the plaintiffs' rights; that it was a mere negative contract, such as a person who had nothing whatever to say to the land might have made with impunity. As a consequence of this being a purely negative contract, the defendant further says he *has* performed it, and *is* performing it; as he has never authorized anyone to interfere with the plaintiffs; that though he did, under seal, authorize the cinema company to do so, and they have done so, still, as they had notice of the plaintiffs' contract, it being a purely negative contract, a Court of Equity would restrain them from preventing the plaintiffs from posting the bills.

I see from the report of the case in the Court below that the plaintiffs' counsel said: "By the demise to the picture-house company, the licensor deprived himself of the power to fulfil his obligation to the plaintiffs, the licensees, under the prior agreement."

I confess that were it not for the elaborate argument of the Solicitor-General, and the full, considered judgment of Kenny J., I should have thought this a plain case. It was admitted before us (as in the judgment of Kenny J.) that the only question is, Was there a breach of the contract by the defendant? It was admitted that the action for breach lay; that the contract was not a lease under Deasy's Act, at least the Solicitor-General said he did not wish to argue that it was; and that the plaintiffs had done nothing, by novation or otherwise, to release the defendant

(1) L. R. 7 Ex. 111, at p. 112.

Appeal. 1915.

ALLEN & SONS v. KING.

Ronan L.J.

from his obligations under the contract. However, the case requires that I should deal in detail with the elaborate argument of the Solicitor-General, and the judgment of Kenny J., for whose opinion, I need hardly say, I have the greatest respect.

The argument and judgment did not deal in detail with the terms of the agreement itself, but proceeded on the somewhat curious lines I shall mention.

I wish in the first place to state the following propositions as settled law:—

1. A licensee, though the licence is under seal, cannot sue, in his own name, a wrongdoer who disturbs the enjoyment of his licence: *Hill* v. *Tupper* (1); *Heap* v. *Hartley* (2); *Fitzgerald* v. *Firbank* (3). 2. "A licence under seal (provided it be a mere licence) is just as revocable as a licence by parol," adopted by Buckley L.J., at p. 6 of *Hurst's Case* (4), from the judgment in *Wood* v. *Leadbitter* (5). It passes no estate or interest unless it operates as a grant or conveyance of such estate or interest: *Holford* v. *Bailey* (6). 3. In the case of a mere grant of an estate without covenants express or implied, the effect of the transaction is complete on the execution of the grant. The grantee gets the estate, but the grantor is under no contractual liability to him.

The argument for the appellants, based on the judgment of Kenny J., was on the following lines:—1. The defendant is entitled to substitute for the actual contract an imaginary instrument under seal consisting of (*a*) a grant of a right to affix bills, &c., as provided in clause 1 of the agreement, and (*b*) a covenant for quiet enjoyment without interruption by the defendant or any person claiming through or under him. 2. This covenant is the measure of the defendant's liability, and it does not apply to unlawful acts. 3. The cinema company had notice of the agreement with the plaintiffs, and, on the principle of *Tulk* v. *Moxhay* (7), were bound by it; their refusal to allow the plaintiffs to post the bills was, therefore, an unlawful act.

(1) 2 H. & C. 121.
(2) 42 Ch. D. 461.
(3) [1897] 2 Ch. 96.
(4) [1915] 1 K. B. 1.
(5) 13 M. & W. 838.
(6) 13 Q. B. 426.
(7) 2 Ph. 774.

The ground on which it was alleged that the defendant was entitled to substitute this imaginary document for the real contract in the case was, that the plaintiffs' rights under the real agreement cannot be greater than those under the imaginary document. (I shall attempt to show later on that this allegation is wholly without foundation.)

In the judgment of Kenny J., he substitutes "grant of a *licence* under seal" for "grant of a *right* under seal."

I first propose to show that, even admitting No. 1 and No. 2 to be correct, No. 3 fails, as the refusal of the cinema company *was* the lawful act of persons claiming through the defendant, and therefore a breach of the imaginary covenant for quiet enjoyment.

The privilege or right of bill-posting was not given for the benefit, or in connexion with any lands of the plaintiffs in the neighbourhood. They had none. The Solicitor-General admitted that it was an easement in gross; that there was no dominant tenement. It seems to have been admitted in the Court below, that if the contract was a mere negative contract, and the cinema company had notice of it, they would have been bound by it on the doctrine of *Tulk* v. *Moxhay* (1). Kenny J. held that it was a mere negative contract, and that therefore their conduct was unlawful, and therefore not a breach of the defendant's imaginary covenant for quiet enjoyment, which was his only contract with the plaintiffs.

I referred the Solicitor-General to four specific decisions of the Court of Appeal in England, viz., *Formby* v. *Barker* (2); *In re Nisbet and Pott's Contract* (3); *Millbourn* v. *Lyons* (4); *London County Council* v. *Allen* (5). It would be pedantry to go through them in detail. The effect of the first of them is thus stated in the 1st (1906) edition of Williams' Vendor and Purchaser, vol. i, p. 427:—"Where a landowner enters into restrictive covenants with some person, but not with the object of benefiting the owners and occupiers of some other land belonging to the covenantee, as

(1) 2 Ph. 774.
(2) [1903] 2 Ch. 539.
(3) [1906] 1 Ch. 386.
(4) [1914] 1 Ch. 34.
(5) [1914] 3 K. B. 642.

Appeal. 1915.

ALLEN & SONS *v.* KING.

Ronán L.J.

where a vendor sells all his land in some particular place, retaining no adjoining or neighbouring land, and the purchaser enters into covenants restrictive of the use thereof with the vendor, the burthen of the covenants does not run in equity with the covenantor's land, and the covenantee cannot enforce them by action for an injunction against the covenantor's assigns, *whether they had notice of the covenants or not*; for the burthen imposed in equity by restrictive covenants is analogous to the burthen of an *easement*, which cannot exist in the absence of a dominant tenement." I pass over the second and third. The head-note of the fourth is as follows:—"An owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, which covenant does not run with the land at law, is not bound in equity by the covenant even if he took the land with notice of its existence, if the covenantee is not in possession of, or interested in land for the benefit of which the covenant was entered into. In such a case the doctrine of *Tulk* v. *Moxhay* (1) does not apply."

The history of the development of the law will be found in the most interesting judgment of Scrutton J., who evidently preferred the old theory of *Tulk* v. *Moxhay* (1), but felt bound by the three preceding decisions. He places the origin of the present doctrine in the judgment of Jessel M.R., in *London and South Western Railway Co.* v. *Gomm* (2) in 1882. I have found it in 1859 in *Malone* v. *Harris* (3). It is most clearly stated in the argument for the defendants (which prevailed) at p. 35: "The principle of *Tulk* v. *Moxhay* (1) does not apply. That certainly does decide that, in a certain class of cases, this Court will give relief to a covenantee without reference to the question whether at law his covenant would run with the land or not; but these are all cases where there is a stipulation *with the owner or lessee of certain property*, that certain neighbouring property shall be or shall not be used in a particular way, as in that very case of *Tulk* v. *Moxhay* (1), where the agreement was to keep a square garden in a neat state."

(1) 2 Ph. 774.
(2) 20 Ch. D., at p. 583.
(3) 11 Ir. Ch. R. 33.

It is obvious, if these cases are law, that the act of the cinema company was the lawful act of a person claiming directly through and under the defendant. I asked the Solicitor-General what he asked us to do with respect to these cases. He said he would ask us to overrule them, but he gave no reasons for this, nor did he attempt to distinguish them in any way that I could understand. We must follow these cases; they dispose of the only point seriously argued in the case or relied on in the judgment of Kenny J. The attention of the Court below does not appear to have been called to these cases. I must, however, deal with the case as dealt with in the Court below.

As to the agreement being itself a grant of a right, or an agreement to grant a right which would be specifically performed by a deed of grant with the usual covenants for title, I asked the Solicitor-General what the right was, and he was driven to reply, "an easement in gross," and he cited the note of "Mr. Willes" in Gale on Easements, 8th ed., at p. 14, as an authority for the proposition that such a right could be granted. He said he could produce no other authority. This note has been reproduced in all the editions of Gale, but all agree in stating the law to be that a profit à prendre can be granted in gross, but that an easement, as distinguished from a profit à prendre, can only be granted as appendant to or for the benefit of lands of the grantee. When the distinction between easements and profits à prendre is immaterial, the latter are sometimes spoken of as easements even by the most accurate judges, *e.g.*, Kay J., in *McManus* v. *Cooke* (1), speaking of "*Jones* v. *Flint*" (2), calls a profit à prendre an "easement." Even Willes J. himself, in *Bailey* v. *Stephens* (3), describes the profit à prendre in *Welcome* v. *Upton* (4) as "an easement in gross." I think undue importance has been attached to this note under the mistaken impression that Willes J. was the author of it. The note was referred to in argument in *Shuttleworth* v. *Le Fleming* (5), where it appears that it was the note of "the late Mr. Henry Willes," and, curiously enough, at p. 688, Willes J. says, in direct contradiction of the opinion of his namesake, "In

(1) 35 Ch. D., at p. 688.
(2) 10 A. & E. 753, 759.
(3) 12 C. B. (N. S.), at p. 113.
(4) 6 M. & W. 536.
(5) 19 C. B. (N. S.) 687, at p. 695.

Appeal. 1915. ALLEN & SONS v. KING. Ronan L.J.

Ackroyd v. *Smith* (1) this Court held that a right of way could not be claimed in gross." No notice of the note was taken in the judgment.

In *Mounsey* v. *Ismay* (2), Martin B., in his judgment, at p. 497, says, "In Mr. Gale's book an easement is defined, a very great number of authorities are collected, and it is stated in the most explicit terms that to constitute an easement there must be two tenements—a dominant one to which the right belongs, and a servient one upon which the obligation is imposed." He says, however, at p. 498: "But after what fell from this Court in *Welcome* v. *Upton* (3), and in the same case (6 M. & W. 536), and *the note* of the late Mr. Henry Willes in Gale . . . we are not prepared to say that the statute [the Prescription Act] may not extend to easements in gross." This is the only approach to an approval of the note that I have found by anyone. I cannot understand this reference to *Welcome* v. *Upton* (4). It is a clear case of a profit à prendre, as Martin B. pointed out in *Mounsey* v. *Ismay* (2), at p. 493; and I cannot find anything in either report of *Welcome* v. *Upton* (4) relating to easements in gross.

This distinction between easements proper and profits à prendre can hardly have been well established at the date of *Wood* v. *Leadbitter* (5), as even if the document had been under seal such an interest in land could not have been granted in gross according to modern law. In the "Law Quarterly Review" for 1908 (vol. xxiv, p. 265) Mr. T. Cyprian Williams, the eminent conveyancer and author of "Vendor and Purchaser," says, "In *modern times* it is not allowed that there can be an easement in gross." He cites, among other cases, *Rangeley* v. *Midland Railway Co.* (6), where, at pp. 310, 311, Lord Cairns says, "There can be no *easement properly so called* unless there be both a servient and a dominant tenement. There can be *no such thing* according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement." Since this judgment I know of no suggestion of

(1) 10 C. B. 164.
(2) 3 H. & C. 486.
(3) 5 M. & W. 398.
(4) 5 M. & W. 398; 6 M. & W. 536.
(5) 13 M. & W. 838.
(6) L. R. 3 Ch. 306.

the possibility of a grant of an easement (as distinguished from a profit à prendre) in gross.

The question arose in a curious way in *Fitzgerald* v. *Firbank* (1). There was a grant by deed in gross of "the exclusive right of fishing" in a certain place.

It was argued that this was a mere revocable licence, that it *gave no right to the fish*, and that the grantees could not sue in their own name for injury to the fishery. Lindley L.J. said, at p. 101: "The right of fishing includes the right to take away fish, unless the contrary is expressly stipulated. *Therefore*, the plaintiffs have a right as distinguished from a mere revocable licence. What kind of right is it? It is *more than an easement*—it is what is commonly called a profit à prendre, and it is of such a nature that a person who enjoys that right has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights." Lopes L.J. said (p. 102): "It seems to me that it cannot be contended that this deed gives only a mere licence; it is a profit à prendre." Rigby L.J. said (p. 103): "The distinction between a licence and a grant is clear, and if you find a person affecting to grant by deed *rights* in respect of real property *which are capable of being so granted*, that is a grant and not a licence." "A grant by deed creates an incorporeal hereditament where the subject is of such a nature that the law allows an incorporeal hereditament to be granted." The case turned on the right to carry away the fish, because an easement cannot be granted in gross, but a profit à prendre can.

The dissenting judgment of Bramwell B. in *Nuttall* v. *Bracewell* (2) is quoted in Goddard on Easements (at p. 14, 5th ed.), as suggesting that the law is not quite settled on this matter. However, the attempt to distinguish *Hill* v. *Tupper* (3), at pp. 11, 12, can hardly be taken seriously. The analysis of an exclusive right would prevent a man's having an exclusive right to his own garden. It is curious reading, but even Jove himself sometimes nods.

I think we must hold that there cannot be an easement in

(1) [1897] 2 Ch. 96.
(2) L. R. 2 Ex. 1.
(3) 32 L. J. Ex. 219; 8 L. T. 793.

Appeal. 1915.

ALLEN & SONS *v.* KING.

Ronan L.J.

gross of the kind suggested in this case. This of itself disposes of the entire argument for the defendant, as then there could be no such deed as suggested. I may say that the authorities above cited in reference to the application of *Tulk* v. *Moxhay* (1) seem all based on the principle of the necessity of the dominant tenement *in an easement.*

I now wish to say a few words on the substitution of the deed of grant and covenant for the agreement, even if an easement in gross could be granted, and this was a contract for such a grant.

If this were a contract for the purchase or lease of an interest in land "capable of being granted," such as a valuable several fishery, it would be finally carried out by a deed of grant or lease with such a limited covenant for quiet enjoyment as has been suggested. But has it ever before been suggested that the terms of the final conveyance are the measure of the purchaser's rights under the contract? So far from it, the conveyance, which is the final step in the transaction, extinguishes most of these rights, *i.e.*, the title of the grantor to make the grant. Under the contract the purchaser has a right to get what he has bargained for, and to require the vendor to prove that he has a good title to grant it up to the time of the execution of conveyance. He must furnish an abstract, and show and prove a good title. The purchaser does not accept the grant until this has been done. If the vendor fails to do it, it is a breach of contract for which an action lies. The following is from Dart's "Vendors and Purchasers," vol. ii, p. 711, 4th ed.) :—"With some few special exceptions, a purchaser, after the conveyance is executed, has no remedy either in law or in equity in respect of any defects in the title to or quality of the estate which are not covered by the vendor's covenants for title."

These covenants are much more limited than the vendor's obligation to prove title under an open contract, and in an action on the covenant the purchaser cannot call on the vendor to produce an abstract and prove his title. In fact, covenants for title are really an ancillary protection to a purchaser to whom the vendor has already discharged his obligation under the contract of vesting

(1) 2 Ph. 774.

the estate in the purchaser, and thus enabling him to sue wrong-doers, and giving him absolute legal priority over subsequent assignees of the vendor. Here, even if it was a contract for the sale of an interest in land, and nothing more, the defendant has not made the conveyance, and has put it out of his power to do so.

If it was a contract for the sale of an interest in land, it was an open contract, and the conveyance should have given the legal estate in the easement. It is absurd to suggest that a person has performed a contract to grant an estate to *A*, by granting it to *B*, and giving him notice of *A*'s contract. It is an attempt to determine the construction of the contract by substituting for it an instrument of a different character, with different language, and to which wholly different considerations apply.

I now come to the contract itself. The opinion of Kenny J. as to its construction appears from the following passages in his judgment:—"To render the defendant liable in respect of the interference with the plaintiffs' rights under that agreement it is necessary to establish that the act of interference was the direct act of the defendant, or one which, under the circumstances, he must be deemed to have authorized." "The test of liability is whether the acts of interference . . . can be properly attributed to the defendant himself or to persons authorized by him." These statements show his views to be, that the contract "*is to be construed to mean merely that he is not to interfere actively to prevent*" posting the bills, or to authorize anyone else to do so. The words in italics are the words of Willes J., hereinafter quoted. Kenny J. proceeds:—"I am quite willing to place the licence of the 1st July on a higher plane than that to which it is entitled. . . . I shall, for the purposes of argument, treat this licence as one under seal, and with a covenant by the defendant for quiet enjoyment without interruption by the defendant or any person claiming from, under, or through him."

Now, the imaginary deed of the Solicitor-General at all events purported to vest in the plaintiffs a right or *interest* which would enable them to sue in their own names for the protection of their rights, and which must continue for the term, in addition to the covenant. The deed of the judge gives them the negative covenant alone. He does not suggest that the *grant of the licence* imposes

Appeal. 1915. ALLEN & SONS v. KING — Ronan L.J.

any duties on the defendant beyond those imposed by the negative covenant. The grant of the licence may, therefore, be struck out, and an agreement to do nothing to prevent the posting is the entire result of the agreement. This quite agrees with his tests of a breach of the contract, above quoted. He does not examine the contract in detail, but he assumes that it simply means that the defendant's obligations under it are discharged if he signs and seals (what difference the seal makes, I find it hard to see) a piece of paper purporting to authorize the plaintiffs to put up the bills, and then does nothing to prevent them. He subsequently discusses the authorities on covenants for quiet enjoyment, and arrives at the conclusion that there was no breach of such a covenant. He assumes that the contract imposed no positive obligations whatever on the defendant. However, he admits that nothing more than licence was intended. Now, if *The London Council* v. *Allen* (1) and the other cases are law, I have shown that, even on this extreme view, there has been a breach of the contract. But I cannot accept this construction.

I now proceed to examine the contract further. If there cannot be an easement in gross, it *can* only be a purely personal contract. Even if there could be such an easement in gross, I do not think, having regard to its terms, and the position of the parties, and the amount of the consideration, that it can ever have been intended to be a contract to be carried out by proof of title, and completed by a conveyance. This would be the result of holding it to be a contract for the grant of an interest in land. In my opinion, it is a purely personal contract to give the plaintiffs what Gibson J. described as "the rights of a licensee," and nothing more. It is all licence, and nothing but licence. The description of the parties is licensor and licensees—Clause 1, "the *licensor* hereby gives the *licensees permission*." Clause 2, "the *licensees* will pay for *such permission* a rent of £12 per annum, so long as this *licence* continues in force," &c. Clause 5 is in these terms:—"The licensor shall not while this remains in force license or permit any other person to affix any bill to the wall," "and will, if required by the licensees, take proceedings against any person

(1) [1914] 3 K. B. 642.

or persons who may, *during the continuance of this licence*, affix any bill to the said wall." This clause seems to me really conclusive on the entire case. It proves—1, that the licence was to be an effective licence, not a mere negative undertaking not to prevent. 2, That it was not intended that the licensee should have the right to sue in his own name for interference with his rights, and that, therefore, he should only have the rights of a licensee. 3, The fifth clause states twice that it is to operate during the continuance of the licence. Can it be contended that it did not create a contract by the defendant that he would during the same period retain *his* right to sue, so as to make the clause operative?

What is the plaintiffs' position now? They cannot sue in their own names. They cannot sue in the defendant's name. Is it pretended that they can sue in the name of the cinema company?

Kenny J. does not even refer to this clause, or to clause 2. He admits that it is to be an exclusive licence. How would he suggest that the plaintiffs or the defendant could now prevent other persons putting up bills?

It was, therefore, a contract for a licence and an exclusive licence. It was a licence to be "in force" (Clauses 2 and 5). Being only a licence, the plaintiff could not sue wrongdoers. Clause 5 became necessary to enable the plaintiffs to protect themselves. Take this clause, clause 1, and clause 2 together. Was the contract for "a really valid" continuing lease, or for a piece of paper with a purely negative undertaking by the defendant—"If you like to post bills on a wall down there, I won't do anything to prevent you"? Nothing more, according to Kenny J. An agreement to give a lease has been held to mean a really valid lease. In the case of *Stranks* v. *St. John* (1), the lessor had no title. Willes J. said (p. 379):—"This . . . raises the question whether such an agreement is merely an agreement to sign a piece of parchment, or whether it binds the lessor to grant *a really valid lease.*" This action was on the agreement for the lease, and the breach was that the defendant had no title. It was held that lease meant a *real and valid lease*, and that the plaintiff was

(1) L. R. 2 C. P. 376.

Appeal. 1915.

ALLEN & SONS v. KING.

Ronan L.J.

entitled to recover. This decision was approved of by Lord Russell C.J. in *Baynes & Co.* v. *Lloyd & Sons* (1).

Surely if an agreement for a lease for seven years means a real valid lease, a licence for four years means a real valid continuing licence, and this necessarily implies that the grantor shall continue to have the power to make it such for the four years. The defendant is to continue the permission for four years, and during that time he is to permit the plaintiff to sue in his name.

A licence involves a licensor and a licensee. A real licence must imply a licensor having power to grant it, and continue it. Was there any licence in existence after the lease to the cinema company? If so, who was the licensor? There cannot be a licensee without a licensor, from whom the licence derives its force. The licensor was to be a person capable of suing for the protection of the exclusive licence, and bound to do so.

The £12 in clause 2 is called rent. It is not rent. The cinema company cannot claim it. What is the consideration for its payment by the plaintiffs? The performance of his side of the contract by the defendant. If there has been no breach, the defendant is entitled to recover it for the four years from the plaintiffs.

To put the same thing in another way: the "rent" is payable "so long as this licence remains *in force*." Did it remain in force after the lease to the cinema company? Whose licence was it then? If the licence "remains in force," the plaintiffs must pay the defendant the rent. If it does not "remain in force," there is a clear breach of contract.

Coleman v. *Foster* (2); *Roffey* v. *Henderson* (3); *Judge* v. *Lowe* (4), are all authorities that "a licence is determined by an assignment of the subject-matter in respect of which the privilege is to be enjoyed." It ceases to have any force. Such an assignment is a breach of contract for a licence for a definite period, as it puts it out of the power of the party to continue the licence.

This is the result of the cases. I cannot see what bearing

(1) [1895] 1 Q. B. 820, at p. 822.
(2) 1 H. & N. 37.
(3) 17 Q. B. 574.
(4) I. R. 7 C. L. 291.

Hurst's Case (1) has on this. There was no question of breach of contract in that case. It was admitted that there was such a breach.

Kenny J. suggests as a reason for adopting his construction of a mere negative agreement, not to prevent the posting, that "if it were otherwise, the defendant would be in the position of an insurer of the plaintiffs against acts, no matter how tortious they might be, or by whom committed, or under what circumstances of accident or otherwise." Surely this is not so; it is a question of the construction of the contract. The breaches sued on are not the trespass of an ordinary third party; they are three:—(1) That the defendant has put it out of his power to perform his contract. (2) That he has done an act which determined the licence. (3) That he has authorized persons under his hand and seal actively to interfere with the plaintiffs' rights under the contract, and that they have done so. The giving a lease of the premises was anticipated at the date of the contract, and the present result therefore might have been guarded against in the contract by a simple clause that if the licensor required to assign the lands, the licensee should accept, in lieu of the present contract, a contract by the assignee to perform this contract as if he had been named therein in the place of the licensor. Is the defendant to be in a better position than if there was such a clause in the contract? It appears that the unfortunate plaintiffs were quite willing to consent to such an arrangement, but the defendant could not induce his assignees to join in it. 1, 2, and 3 were the acts of the defendant himself, 3 being the creation of the lease which was acted on.

It has become impossible for the defendant to perform his contract before the time for performance arrived.

What is the law applicable to such breaches as are alleged in this case? The general rule is thus stated in the often-quoted passage from the judgment in *Baily* v. *de Crespigny* (2): "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this

(4) [1915] 1 K. B. 1.

(5) L. R. 4 Q. B. 180, at p. 185.

Appeal. 1915.

ALLEN & SONS v. KING.

Ronan L.J.

construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against, in the contract, or where the impossibility arises from the act of the promisor." (Curiously enough, both alternatives apply in the present case. A lease to a company was actually anticipated, and the present result might have been guarded against; and the impossibility arose from the act of the promisor). "But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

In the judgment of Dodd J., he deals with the case as a pure common law action of contract, turning on the construction of the contract itself. He cites a case of a very similar contract, and shows how one of the strongest Courts that ever sat dealt with it. It is much to be regretted that the attention of Kenny J. had not been called to this case, as I think it would probably have modified his conclusions. The case deals with almost every question arising in the present case, and seems to me so direct an authority that I must refer to it in detail.

The case is *Smart* v. *Jones* (1). The declaration stated in its own terms an *agreement* between certain parties who were represented by the plaintiffs and defendants—and whom I shall call the plaintiff and defendant for brevity—"that the defendant agrees with the plaintiff that the plaintiff *may* dig and carry away cinders from a cinder-tip, the property of the defendant, paying two shillings per ton for same, the plaintiff leaving the sum of £50 deposited in Bank as a security for the fulfilment of this agreement." That was practically the entire agreement. The breach was stated thus:—"Yet the said cinder-tip was *not, at the time* of the making of the said agreement, *or at any time afterwards, the property* of the said defendant, and the plaintiff could not dig and carry away; and the said *defendant never could authorize him* to dig or carry away cinders from the said cinder-tip, but the said

(1) 15 C. B. (N. S.) 717.

plaintiff was wholly prevented from so doing." There was a plea that the cinder-tip was part of the soil, and that the agreement was not under seal, and a demurrer to this plea. On this demurrer the defendant must have succeeded if the declaration was bad. The fourth point of demurrer was "no warranty of title."

It was argued that the agreement was for a profit à prendre, and required a seal.

Erle C.J. in the course of his judgment said, "It seems to me to be simply a question whether, where a party has entered into a valid contract, and has broken it, an action will lie for such breach." . . . The defendant agreed with the plaintiff that he might dig and carry away cinders from a certain cinder-tip which is described as the property of the defendant, and when the plaintiff, in pursuance of the agreement, went to the place to exercise his right under the agreement, he was prevented from doing so. Suppose the place where the cinders were had been fenced round, and the gate giving access to it had been locked, and the agreement had been that, in consideration of certain payments to be made by the plaintiff, the defendant promised that the gate should be open so that the plaintiff might enter and take the cinders, *it would be quite immaterial whether the gate was locked by the defendant or by a third person.* . . . If this had been a contract for *an interest in land*, or *a licence for the exercise of some right on the land*, I should have found it necessary to consider the authorities which have been referred to. But if the defendant, for a good consideration, has made a promise, and has broken it, an action clearly lies for that breach."

I think it plain that by "licence" here, the Chief Justice means what is more fully described by Willes J. in the passage, 'So, if this had been a *mere* licence, *without consideration*. But this is an agreement, for a valuable consideration." They both plainly meant the same thing. Williams J. in the course of his judgment said (p. 723), "I do not mean . . . to say, that, *supposing the defendant had a right to grant the plaintiff permission to dig and carry away cinders from the cinder-tip, anything beyond a* licence to enter upon the land for the purpose of taking away the cinders would be conferred by the agreement. But I *entirely agree with my Lord in the construction which he has put upon the instrument;*

Appeal. 1915.

ALLEN & SONS v. KING.

Ronan L.J.

and I think the declaration discloses a breach of it, for which an action will lie."

Willes J. in the course of his judgment said :—"It appears to me that in this case no difficulty at all arises with reference to the common law rule as to the grant of an incorporeal hereditament, and for this reason, because the plaintiff does not assert that he is entitled to any actual *interest* enabling him to enter upon the land. He relies upon an agreement whereby the supposed owner of the cinders says that the plaintiff may dig and carry away the cinders, which necessarily involves the right to enter for the purpose of doing so ; as, if there were a grant of a tree or other natural fruit of the land, that would carry with it an irrevocable authority to enter upon the land for the purpose of cutting down and carrying away the tree. But that is not what the plaintiff here relies on. What he relies on is *an agreement* that he may dig and carry away the cinders. *If that is to be construed to mean merely that the seller is not to interfere actively to prevent the purchaser from taking the cinders, there is an end of the matter* ; so, if this had been a mere licence, without consideration. But this is *an agreement for a valuable consideration.* The buyer in the first instance parts with £50 ; therefore it is necessary to put upon the agreement a more extensive, because a more reasonable, construction, of which it is well susceptible. The seller agrees that the buyer shall have the article contracted for ; and the latter, through the default of the former, has been unable to obtain it, the seller having no title : and so the buyer has lost the profit he would have made and his £50. Had this been a case in which the plaintiff alleged an irrevocable authority by reasonof the contract for the sale of the cinders, there might have been a difficulty ; because the sale was not a sale of a specific chattel lying upon the land of the seller, which would, as I conceive, give an irrevocable authority to the buyer to enter and take the thing" : (as the property *passed* it would then be a licence coupled with an interest), "but, taking the declaration and the plea together, it was right to take certain cinders constituting part of a heap which had become a portion of the soil. Such a right as that may come within, and does appear to me to come

within, the law as contended for by Mr. Coleridge; and such a licence as that would seem to be one which requires a grant,—like a licence to work a mine. But, long before you arrive at that difficulty, the plaintiff's case is founded upon a *contract*, and the breach of it, not alleging any fixed interest in an incorporeal hereditament, but alleging that the vendee has not had that which he bargained for, and that by reason of a breach of contract on the part of the seller. For that breach an action may well lie.

Keating J. said:—"The declaration shows a contract whereby the plaintiff for a good consideration agreed that the defendant should have liberty to dig and carry away the cinders; and it goes on to allege, that, by the defendant's default, he was prevented from doing so. That is a perfectly good contract."

Now, compare that case with the present. The promise there was—that the plaintiff "may dig and carry away the cinders." Here it was—"The licensor hereby gives the licensees permission." In both, the plaintiff does not allege or rely on "any *actual interest*" entitling him to enter on the land. If the words of the contract imported the grant of such an interest in this case, it would have been an easement in gross which could not exist. In *Smart* v. *Jones* (1) it would have been a profit à prendre which can lawfully be granted in gross. Notwithstanding this, the Court held it a personal contract in that case, and not one for an interest in land.

The breach of contract in that case was that the plaintiff had no title when he made the contract; in this, that he deliberately put an end to his title by his own act after the agreement, and so made it impossible for him to carry it out.

If the breach in *Smart* v. *Jones* (1) had been "the defendant, before the plaintiff had taken any of the cinders, had assigned over all his interest in the lands and cinders," can there be any doubt that the result would have been the same? It decided that it was a contract only for a licence, but that it meant a real effective licence, and not a mere negative limited contract not to interfere; that it was immaterial whether the plaintiff was prevented by the defendant or a stranger, and all this simply on the words practically of clause 1 of the present agreement. There

(1) 15 C. B. (N. S.) 717.

Appeal. 1915.

ALLEN & SONS v. KING.

Ronan L.J.

is nothing in the contract in *Smart* v. *Jones* (1) corresponding to all the other clauses in the present contract to which I have referred.

Willes J. relied on the consideration in that case as a reason for the construction. Is it nearly as strong as the obligation on the plaintiff here now to pay £12 per annum for four years, which he must pay the defendant if there has not been a breach by him of the contract? There was no obligation on the plaintiff in *Smart* v. *Jones* (1) to pay anything unless he took the cinders. The defendant there could not claim the £50 unless the plaintiff failed to pay for cinders he had taken. The passage in the judgment of Willes J. beginning, "But, long before you arrive at that difficulty," pp. 725-6, shows that it is wholly immaterial in an action like the present whether the licence is "revocable" or "irrevocable."

The result I have arrived at may be stated as follows:—

(A) If the *London County Council* v. *Allen* (2) is law, there is no question in the case.

(B) If it is not, the *only* question is the construction of the contract—1. If it was an open contract to grant an "easement in gross," and if such an easement could exist, the defendant has not granted the easement, and has put it out of his power to do so, and the plaintiffs can recover. 2. If the contract imposed *any* positive obligation on the defendant, and was not, in the words of Willes J., "to be construed to mean merely that the defendant would not actively interfere to prevent the plaintiff," then the defendant having put it out of his power to perform any positive obligation, the plaintiffs are entitled to recover. 3. On the widest view of *Tulk* v. *Moxhay* (3) no such positive obligation would be transferred to the cinema company. 4. Even if all the obligations of the contract were transferred to the cinema company, it would not release the defendant. 5. I think the contract imposed on the defendant positive obligations—(i) To retain such control over the lands as would enable him (*a*) to give an effective permission during the four years; (*b*) to sue wrongdoers who put up bills on the premises. (ii) To do everything that could be reasonably

(1) 15 C. B. (N. S.) 717. (2) [1914] 3 K. B. 642. (3) 2 Ph. 774.

required to make the permission effective during the four years. The lease to the cinema company put it out of his power to perform any of them, therefore the plaintiffs can recover. I am, therefore, of opinion that the execution of the lease was a breach of the contract, which entitled the plaintiffs to sue.

I am further of opinion, on the principle of *Baily* v. *de Crespigny* (1), and the authority of *Smart* v. *Jones* (2), that the interference by the cinema company was a breach of the contract.

Even if the contract were a mere negative contract not to interfere or authorize interference, I should be inclined to hold that when the defendant by deed authorized the cinema company to interfere with the plaintiffs, and they did so, this would have been a breach of such a contract, although a Court of Equity might have restrained them from doing so as an unconscientious act. It seems to me that the cases of covenant for title in conveyances do not apply. There the covenantee has the title, and can put the wrongdoer out by force. The covenant is only ancillary to his own right to protect himself against wrongdoers. Here he has no such right, and the provision not to interfere or authorize interference is his sole protection.

I will conclude by citing a few words from the judgment of Dodd J. in the Court below, which seem to me to sum up the entire case:—

"The promise is not that he will not do something; it is a promise that we will do something, that is, give permission. It is, upon my construction of the contract, an absolute unqualified promise . . . If he is unable, either by not having power to do it at the time he makes the contract, or by depriving himself of the power after he has made the contract, or by not being able to control those whom he thought he could control, then he has not kept his promise, and is liable in an action for breach of contract."

MOLONY L.J.:—

The principal matter to be determined in this case is the legal effect of the memorandum of agreement dated the 1st July, 1913, and made between the defendant (therein called "the licensor")

(1) L. R. 4 Q. B. 180. (2) 15 C. B. [N. S.] 717.

Appeal. 1915.

ALLEN & SONS v. KING.

Molony L.J.

of the one part and the plaintiffs (therein called "the licensees") of the other part.

The agreement provides in express terms that the licensor thereby gave the licensees "permission to affix bills, posters, and advertisements to the flank wall at side of picture-house proposed to be erected at Royal Canal Bank and Madras Place, Dublin, for a term of four years, from the 1st November, 1913, or the first day said picture-house shall be opened for business, whichever shall first happen." The agreement further provides:—(*a*) That the licensees shall pay for such permission a rent of £12 per annum. (*b*) That the licensor shall give the refusal of any other sites he may be desirous of letting for advertising purposes at reasonable and proportionate terms to the licensees. (*c*) That the licensor shall not, while the agreement remains in force, license or permit any other person or persons to affix any billposting or advertisement to the said flank walls or any part thereof, and will, if required by the licensees, take proceedings against any person or persons who may during the continuance of the licence affix any billposting or advertisement to the said flank walls.

It has been argued by the Solicitor-General, on behalf of the defendant, that this agreement operated as a lease; that the effect of the transactions between the defendant and the picture company was that the company took the premises subject to the provisions of the antecedent agreement, and that the defendant could not be held liable for the subsequent acts of the company, which he was powerless to control.

I am, however, satisfied that in no view of this case can the instrument in question be regarded as a lease, and I am sure that the parties to it would have been very much surprised if they thought that the contract which they were entering into was anything more than a licence for a definite term, in consideration of a fixed payment.

By section 1 of 23 & 24 Vict. c. 154, the word "lease" is defined to mean "any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands, in consideration of a rent or return," and the word "lands" in the

statute includes "houses, messuages, and tenements of every tenure, whether corporeal or incorporeal."

It is quite clear that the instrument in this case was not intended to give exclusive possession or enjoyment of any part of the premises. The Solicitor-General admitted this, but hinted, rather than argued, that the instrument could operate under the statute as a lease of an incorporeal hereditament. A great difficulty in his way in applying any such construction is that the plaintiffs have no interest whatever in any land which could be regarded as a dominant tenement. If an easement were a right to which a person could be entitled irrespective of the possession of land, such a right would be an easement in gross, but it is clear that no such right is recognized by the law. As Lord Cairns said in *Rangeley v. Midland Railway Company* (1): "There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement."

The instrument in this case comes exactly within the description of a licence given by Vaughan C. J. in *Thomas* v. *Sorrell* (2): "A dispensation or a licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, had been unlawful."

That the parties did not mean to alter or transfer property is, I think, shown by the whole frame of the instrument, but particularly by the clause in which the licensor bound himself, if required by the licensees, to take proceedings against any person or persons who might, during the continuance of the licence, affix any bill-posting or advertisement to the flank wall of the premises. This clause was evidently inserted to meet the case of *Hill* v. *Tupper* (3), which decides that the licensee of a right to go on land for a specific purpose cannot sue in his own name for a violation of the right by a third party.

The cases of *Smith* v. *The Lambeth Assessment Committee* (4); *Wilson* v. *Tavener* (5); and *Warr* v. *London County Council* (6),

(1) L. R. 3 Ch. 306.
(2) Vaughan, 351.
(3) 2 H. & C. 121.
(4) 10 Q. B. D. 327.
(5) [1901] 1 Ch. 576.
(6) [1904] 1 K. B. 713.

Appeal. 1915. ALLEN & SONS v. KING. Molony L.J.

are clear authorities in favour of the instrument in the present case being regarded as a licence; but I think the decision of the House of Lords in the case of *Edwardes* v. *Barrington* (1) is conclusive on the point. In that case the lessee of a theatre granted to a refreshment contractor "the free and exclusive licence and right to the use of all the refreshment bars, smoking-rooms, wine-cellars, and offices" in the theatre, together with the free right of access thereto, and also the sole and exclusive right of advertising therein, for a term of years at a fixed rent. The grant contained a power to determine the term on non-payment of rent, and a covenant for quiet enjoyment. It was unanimously held in the House of Lords that the effect of the document was to grant a licence under which the refreshment contractor took no estate or interest in the property, and therefore it did not amount to a breach of a covenant in the lease not to assign without the consent of the lessor.

The defendant, on the 29th August, 1913, entered into an agreement with Thomas C. Flynn, as trustee for a company then about to be formed, to give a lease of the plot of ground at Madras Place for a term of forty years, at the rent of £117 per annum, and further agreed to assign to the said Thomas C. Flynn, as trustee for the company, all the interest of the defendant in the agreement of the 1st July, 1913. The Phibsborough Picture House, Limited, was subsequently incorporated, and at a meeting of the directors on the 13th September, 1913, a resolution was passed ratifying and adopting the agreement, and on the same day the defendant executed a lease to the company of the premises, which did not in any way refer to the licence previously given to the plaintiffs.

It has been contended on behalf of the defendant that the company, having ratified the agreement of the 29th August, 1913, thereby assumed liability under the agreement of the 1st July, 1913, although this agreement was not mentioned or referred to in the lease. It is, however, well settled that a company does not, by its adoption of a contract to purchase made before its formation by persons purporting to act on its behalf,

(1) 85 L. T. 650.

incur any contractual relation with or obligation to the vendor. (*In re Johannesburg Hotel Company* (1); *North Sydney Investment and Tramway Company, Limited* v. *Higgings and Others* (2); and there certainly never was any privity between the company and the plaintiffs.

It was further urged on behalf of the defendant that the picture-house company, having taken their lease with notice of the antecedent agreement, were bound to give effect to it; but, even if they had notice, the recent cases of *Millbourn* v. *Lyons* (3) and *London County Council* v. *Allen* (4) clearly show that the company would not, on the facts of this case, be under any liability to the plaintiffs.

On the whole case, it seems to me that the grant of the lease by the defendant was a breach of the agreement to allow the plaintiffs to have the rights of licensees for a fixed term (*Coleman* v. *Forster* (5)), and resulted in the plaintiffs not getting what the defendant had contracted to give them; and, under the circumstances, I think the plaintiffs were clearly entitled to bring an action for damages for breach of contract against the defendant: *Smart* v. *Jones* (6). I am therefore of opinion that the judgment of the King's Bench Division was right and ought to be affirmed.

Solicitor for the appellant: *John J. MacDonald.*
Solicitors for the respondent: *Stewart & Orr.*

R. ST. J. C.

(1) [1891] 1 Ch. 119.
(2) [1899] A. C. 263.
(3) [1914] 2 Ch. 231.
(4) [1914] 3 K. B. 642.
(5) 1 H. & N. 37.
(6) 15 C. B. (N. S.) 717.

INDEX

ACT OF BANKRUPTCY—Adjudication—Relation back—Order and Disposition—Loose practice as to fixing date of act of bankruptcy - - - - - 347
See BANKRUPTCY. 2.

ACTION—Motion to stay—Originating summons in Chancery Division to realize mortgage—Subsequent action in King's Bench Division on covenant for payment - - - - - - - 187
See MORTGAGE.

ACTION FOR RECOVERY OF LAND—Decree in ejectment for non-payment of rent under s. 12, sub-s. 1, of Land Law (Ireland) Act, 1896—Sub-tenant named as defendant—Subsequent action for rent by head landlord against sub-tenant—Sub-tenant estopped from denying tenancy—Lease for ever made prior to 1860—Relation of landlord and tenant
See LANDLORD AND TENANT. [195, 208

—— Ejectment for non-payment of rent—Courts (Emergency Powers) Act, 1914—Leave to issue execution - - - - 11
See PRACTICE. 3.

ADMINISTRATION—Grant of
See under PROBATE AND ADMINISTRATION.

AFFIDAVIT OF SERVICE—Necessity for filing before taking any proceedings in default of appearance - - - 411
See PRACTICE. 5.

AGRICULTURE AND TECHNICAL INSTRUCTION (IRELAND) ACT, 1899—Committee of—Member of committee concerned in contract with county council—Disqualification - - 105, 312
See LOCAL GOVERNMENT. 2, 3.

ANNUITY—Payable to Irish Land Commission—Crown debt - - - - - 66
See PRACTICE. 4.

ANNUITY—*continued.*

—— Payable to Irish Land Commission—Holding subject to—Property passing on death—Principal value—Incumbrance - 149
See REVENUE.

APPEAL — Civil-bill — Plaintiff (Respondent) becoming lunatic—Jurisdiction to appoint next friend - - - - 116
See COUNTY COURT.

——Motion for final judgment—Appeal a rehearing—Judgment to be given as just between parties at date of re-hearing—Appeal from order refusing motion for final judgment where part of claim admitted and amount admitted offered to be brought into Court—Amount subsequently brought into Court with defence
See PRACTICE. 6. [402

——Rateable hereditaments—Valuation 319, 328
See VALUATION ACTS.

APPEARANCE — Default of—Necessity for filing affidavit of service before proceeding upon default - - - - 411
See PRACTICE. 5.

APPORTIONMENT — Fatal Accidents Act, 1846—Infant plaintiff—Money paid into Court—Apportionment - - 210
See FATAL ACCIDENTS ACT, 1846.

AUTREFOIS ACQUIT OR CONVICT — Summary conviction quashed on certiorari—Accused again charged with same offence - - - - - - 169
See JUSTICES. 1.

BANKRUPTCY — *Member of Parliament — Annual Payment to — Salary or Income—Attachment—Public Policy—Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 *Vict. c.* 60), *s.* 319—*Bankruptcy (Ireland) Amendment Act*, 1872 (35 & 36 *Vict. c.* 58), s. 51.] The annual payment of £400 to a member of the House of Commons (including an allowance of £100 for expenses) pro-

BANKRUPTCY—*continued.*
vided for by the Appropriation Acts, is not a salary or income in respect of which, in the event of the bankruptcy of the member, an order can be made under sect. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, for the payment thereof, or any part thereof, to the official assignee. *In re Hazleton* - - - APP. 425 [Rev. H. L.]

2.—*Order and Disposition—"Becomes Bankrupt"—Deposit of Share Certificates between Act of Bankruptcy and Adjudication—Deposit of Policy of Insurance — Notice given to Insurance Company after Adjudication but before Order for Sale—Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 *Vict. c.* 60), *s.* 313.—*Loose Practice as to fixing in affidavit date of Act of Bankruptcy.* By sect. 313 of the Irish Bankrupt and Insolvent Act, 1857, if a bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, the Court has power to order the same to be sold for the benefit of the creditors under the bankruptcy. M. was adjudicated bankrupt on the 21st August, 1914, upon an act of bankruptcy committed on the 21st June, 1914. Between these dates he had deposited certain share certificates and a policy of insurance with a bank as security for his account. *Held*, that M. had become bankrupt within the meaning of the order and disposition section (sect. 313) of the Irish Bankrupt and Insolvent Act, 1857, at the date of the act of bankruptcy, and that, as at that date he himself was the true owner of the shares, that section did not apply. *Lyon* v. *Weldon*, 2 Bing. 334, and *The Ruby*, 83 L. T. 438, followed. In April, 1914, M. had deposited two policies of insurance with a bank as security for his account. On the 15th August he executed a legal mortgage of them to the bank. On the 21st August M. was adjudicated bankrupt, and on the same day notice of the mortgage was sent by the bank to the insurance company. In the following November an order was made *ex parte* under s. 313 of the Irish Bankrupt and Insolvent Act, 1857, for the sale of the policies for the benefit of the creditors under the bankruptcy. *Held*, that the policies were, by the consent of the true owner, in the order and disposition of the bankrupt at the time he had become bankrupt, and that the bank should be ordered to deliver them to the assignees in bankruptcy. *In re Malet's Trusts*, 17 L. R. Ir. 424, and *Bradley* v. *James*, I. R. 10 C. L. 441, considered. *In re Mackay*. [APP. 347

BILLIARD-ROOM — Structural separation from licensed premises - 250
See LICENSING ACTS. 1 .

BONA FIDE TRAVELLER—Sale to, of commodities other than intoxicating liquors during prohibited hours - - 338
See LICENSING ACTS. 2.

BREAD—*Sale of, otherwise, than by Weight—Sales from a Van on Public Road—Prosecution by Common Informer—Bread (Ireland) Act*, 1838 (1 & 2 *Viet. c.* 28), *s.* 4. Section 4 of the Bread (Ireland) Act, 1838, which requires that all bread (with certain exceptions) sold in Ireland shall be sold by weight only, and not by measure, applies to sales from a van on the public road as well as to sales in a shop. A prosecution for an offence under that section may be brought by a common informer. *Rigney* v. *Peters*. [K. B. 342

BUILDING CONTRACT — *Assignment of Retention Money—Work taken out of Contractor's hands—Contract with Sureties to complete—Right to Retention Moneys on Completion.* C., a builder, contracted under a written contract with the Corporation of L. for the erection of certain houses. Payments were to be made upon progress certificates for not more than seven-eighths of the value of the work done and materials on the ground, the balance to be retained until after final certificate. It was a term of the contract that if the Corporation's architect was satisfied that C.'s method of executing the work made it improbable that the works would be completed within the time specified in the contract, the Corporation should be at liberty, on giving to C. ten days' written notice, to take possession and carry out the completion by employing other persons by contract or otherwise. C. had executed part of the works, in respect of which he was paid moneys on progress certificates and in respect of which certain retention moneys payable on completion had accrued, and being indebted to the plaintiffs in the sum of £150, gave an order in writing to the Corporation to pay this sum to the plaintiffs out of the retention moneys. Subsequently the architect of the Corporation certified that it was not reasonably probable that the works would be carried out within the contract time, and the Corporation served notice on C. that, after ten days, possession would be taken up in accordance with the contract. Prior to the expiration of the ten days, the defendants, C.'s sureties for the due performance of the contract, offered to hand over the works to an independent contractor who would undertake to complete for the balance of the moneys in the hands of the Corporation on foot of the contract. The Corporation, by resolution, accepted this offer. The defendants contracted with K. to carry out the works for the balance of the contract money unpaid, including the retention moneys. On the defendants' order the moneys payable on the progress certificates issued after K.

BUILDING CONTRACT—*continued.*
undertook the work were paid to K. by the Corporation. The work was duly completed by K., and he got a final certificate. An interpleader issue having been directed to determine whether the plaintiffs or the defendants were entitled to this sum of £150: *Held*, that the defendants were entitled to the sum in question, on the ground that the original contract was determined and a new substituted contract entered into between the Corporation and the defendants, amounting to a direct bargain that the defendants should complete the work on the terms of the old contract as far as applicable; and on the ground that whether the defendants did the work themselves or through a contractor, they were, as sureties for C., entitled to be indemnified for the costs incurred by them, to the extent of the unpaid price. *M'Mahon* v. *O'Neill*. [Gibson J., 384

CASE STATED—On hearing of civil-bill appeal—Action for rent—Question reserved for Court whether defendant estopped by previous decree in ejectment assumed to be valid—Power of Court to consider validity of decree - - 195, 208
See Landlord and Tenant.

—— On hearing of civil-bill appeal—Costs taxed to over £10—No objection taken to taxing master's certificate—Application to set aside certificate—Proper form of certificate in such cases - - - 423
See Costs.

—— Justices—Right of unsuccessful prosecutor to have a case stated - - - - 169
See Justices. 1.

CASES—*Bradley* v. *James*, I.R. 10 C.L. 441, considered - - - - 347
See Bankruptcy. 2.

—— *Canning* v. *Farren*, [1907] 2 I.R. 486, principle applied - - - - 116
See County Court.

—— *Chute* v. *Busteed*, 16 I.C.L.R. 222, applied by Palles, C.B., to ejectment proceedings under s. 52 of Landlord and Tenant (Ireland) Act, 1860 - - - 195
See Landlord and Tenant.

—— *Davy* v. *Gray*, 48 I.L.T.R. 32, followed 210
See Fatal Accidents Act, 1846.

—— *Hurst* v. *Picture Theatres, Limited*, [1915] 1 K.B. 1, followed and applied by King's Bench Division, in *Allen* v. *King* 213
(But see same case in Court of Appeal, p. 448).

—— *Lyons* v. *Weldon*, 2 Bing. 334, followed 347
See Bankruptcy. 2.

—— *Malet's Trusts, In re*, 17 L.R.Ir. 424, considered - - - - - 347
See Bankruptcy. 2.

CASES—*continued.*
—— *R.* (*Hastings*) v. *Galway* (*Justices of*), [1915] 2 I.R. 8, note, followed - - 4
See Local Government. 1.

—— *R.* (*McKenna*) v. *Monaghan Urban District Council*, 38 I.L.T.R. 18, considered 14
See Rates.

—— *Ruby, The*, 83 L.T. 438, followed - 347
See Bankruptcy. 2.

—— *Stedham, In the Goods of*, 6 P.D. 205, followed - - - - - - 9
See Probate. 3.

—— *Tulk* v. *Moxhay*, 2 Ph. 774, qualification to doctrine of, pointed out - - 448
See Licence.

CERTIORARI—Conviction quashed—Accused again charged with same offence 169
See Justices. 1.

CIVIL-BILL APPEAL—Case stated on hearing—Costs taxed to over £10—No objection taken to taxing master's certificate—Application to set aside certificate—Proper form of certificate in such cases - 423
See Costs.

—— Plaintiff (respondent) becoming lunatic—Jurisdiction to appoint next friend 116
See County Court.

CIVIL-BILL DECREE—Ejectment for non-payment of rent—Subsequent action for rent—Estoppel - - - 195, 208
See Landlord and Tenant.

—— Removed to Superior Court—Time from which Statute of Limitations runs 371
See Limitations, Statute of.

CODICIL—By mistake confirming revoked will—Revival - - - - - 9
See Probate. 3.

COMMITTEE—Of Agriculture and Technical Instruction—Member of Committee concerned in contract with county council—Disqualification - - 105, 312
See Local Government. 2, 3.

—— Local Pension Committee—Paid officer—Disqualification for being member of county council - - - 267
See Local Government. 4.

—— Of management of Light Railway—Member of, receiving fee and acting as member of county council—Paid office—Disqualification - - - - - - 393
See Local Government. 5.

COMMON INFORMER—Prosecution by—Sale of bread otherwise than by weight 342
See Bread.

COMPANY — *Winding up — Staying Action against Company in Liquidation—Costs—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, c. 69), s. 140.] Where, under s. 140 of the Companies (Consolidation) Act, 1908, an application is made by notice of motion to stay an action against a company on the ground that a petition has been presented for its winding up, the plaintiff in the action is entitled to receive from the appellant his costs of the motion. *Pierce* v. *Wexford Picture House Co., Ltd.* - - - - - - - K.B. 310

COMPULSORY POWERS.
See LANDS CLAUSES ACTS.

CONTRACT—Breach—Contract restricting user of land—Grant of permission to affix posters on wall—Assignment of premises—Permission refused by assignee—Right of action against assignor - 213, 448
See LICENCE.

—— Completion by sureties—New contract 384
See BUILDING CONTRACT.

CONTRACT OF SERVICE—National Insurance Act — Pilot appointed by port authority - - - - - 283
See INSURANCE (NATIONAL). 1.

—— School attendance inspector appointed by school attendance committee - 262
See INSURANCE (NATIONAL). 2.

CONTRIBUTORY PLACE — Public Health Acts—Special expenses - - 55
See LOCAL GOVERNMENT. 7.

CONVICTION—Summary—General conviction — "Buy, detain, or receive" military property—One offence or several—Fine exceeding £5—Imprisonment ordered in default of payment without first ordering distress—Necessity of showing on face of order grounds justifying distress being dispensed with - - - - 162
See JUSTICES. 2.

—— Summary—Member of board of guardians acting when disqualified—Disqualification consisting of previous conviction within seven years for so acting - 4
See LOCAL GOVERNMENT. 1.

—— Summary—Quashed on certiorari—Accused again charged with same offence 169
See JUSTICES. 1.

COSTS— *Taxation—Application to set aside—Case Stated on Hearing of Civil Bill Appeal—Costs taxed to over £10—No Objection taken to Taxing Master's Certificate—Order LIX, Rule 38—Order LXV, Rule 66 (1) (3)—Proper Form of Certificate in such cases where Costs taxed to over £10.*]—The provision of Order LIX, Rule 38, that in cases stated by a judge of assize under the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, the costs shall not exceed £10, is an absolute prohibition, and is not affected by the provisions of Order LXV, Rule 66 (1) (3), requiring a party dissatisfied with the allowance by the taxing master of items in a bill of costs to carry in before the taxing master an objection in writing within the time therein mentioned, and making his certificate final and conclusive as to all matters not so objected to. Where, on the hearing of such a case stated, costs were awarded to the plaintiffs against the defendants, and the taxing master taxed the plaintiffs' costs to a sum exceeding £10, and signed his certificate for the amount, the Court, on the application of the defendants, although no objection had been taken by them before the taxing master, declared that the plaintiffs were to have £10 for their costs, and no more. In taxing costs in such a case the certificate of the taxing master ought, in addition to showing that he has taxed the costs referred to him to a certain amount, show on the face of it that, having regard to Order LIX, Rule 38, he can certify for merely £10 costs and no more. *Healy* v. *Spillane* (No. 2) [K.B. 423

COSTS—*continued.*

——Application under Order XLII, Rule 24, for leave to issue execution - - 52
See PRACTICE. 1.

—— Company—Winding up—Costs of motion to stay action against company - - 310
See COMPANY.

—— Courts (Emergency Powers) Act, 1914 — Costs of summons to issue execution—Costs of counsel - - - 123
See PRACTICE. 2.

COUNSEL — Costs of — Courts (Emergency Powers) Act, 1914 - - - 123
See PRACTICE. 2.

COUNTY COUNCIL.
See under LOCAL GOVERNMENT.

COUNTY COURT—*Decree—Civil-bill Appeal—Plaintiff (Respondent) becoming Lunatic—Continuing Proceedings—Jurisdiction of Judge of Assize to appoint Next Friend—45 & 46 Vict. c. 29, s. 4.*] A plaintiff in a civil bill had obtained a decree in the county court, from which the defendant appealed to the judge of assize. Before the hearing of the appeal the plaintiff became a lunatic. *Held*, that the judge of assize had jurisdiction to appoint a guardian as next friend of the lunatic for the purpose of the appeal, and had jurisdiction to adjourn the appeal to enable such appointment to be made; and that a nominee of the defendant

COUNTY COURT—*continued.*
might be appointed if no one representing the plaintiff was willing to act. The principle of *Canning* v. *Farren*, [1907] 2 I. R. 486, applied. *Moloney* v. *Looby* - - - - - K.B. 116
—— Civil-bill appeal—Case stated—Costs taxed to over £10 - - - - - 423
See COSTS.
—— Civil-bill decree—Removal to Superior Court—Statute of Limitations - - 371
See LIMITATIONS, STATUTE OF.
—— Civil-bill decree — Ejectment for non-payment of rent — Subsequent action for rent—Estoppel - - 195, 208
See LANDLORD AND TENANT.

COURTS (EMERGENCY POWERS) ACT, 1914—Costs of summons to issue execution—Costs of counsel - - 123
See PRACTICE. 2.
—— Execution—Leave to issue—Ejectment for non-payment of rent - - 11
See PRACTICE. 3.
—— Execution — Right to issue—Crown debt—Annuity payable to Irish Land Commission under Land Purchase Acts 66
See PRACTICE. 4.

COVENANT—For quiet enjoyment 213, 448
See LICENCE.
—— Restrictive — Assignee with notice—Covenantee not interested in land for benefit of which covenant was entered into 213, [448
See LICENCE.

CRIMINAL INJURIES — Compensation — Malicious burning of property—Owner insured against loss by fire—Right of owner to recover off county - 85
See LOCAL GOVERNMENT. 6.

CRIMINAL LAW
See under JUSTICES.

CROWN DEBT—Annuity payable to Irish Land Commission under Land Purchase Acts
See PRACTICE. 4. 66

DAMAGES—Breach of contract—Grant of permission to affix posters on wall—Assignment of premises—Permission refused by assignee—Action against assignor 213,
See LICENCE. [448

DEMISE—Grant of permission to affix posters to wall—Demise or licence - 213, 448
See LICENCE.

DISQUALIFICATION—Of member of county council or board of guardians
See cases under LOCAL GOVERNMENT.

DISTRESS — Summary conviction — Fine exceeding £5 — Imprisonment ordered in default of payment without first ordering distress - - - - - - 162
See JUSTICES. 2.

DOG—*Unmuzzled Dog on Public Road—Dangerous Dog—Summary Jurisdiction (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 92), *s.* 10, *sub-s.* 7.] By s. 10, sub-s. 7, of the Summary Jurisdiction (Ireland) Act, 1851, any person who keeps or suffers to be at large within fifty yards of any public road any dog, without having such dog muzzled, or without having a block of wood fastened to the neck of such dog of sufficient weight to prevent such dog from being dangerous, is made liable to a fine. On the hearing of a summons brought against F. under the sub-section, it appeared that F. had allowed a dog, not a dangerous dog, to be at large on the public road, unmuzzled and without a log. The magistrate dismissed the summons. *Held*, that the magistrate was right in his decision, on the ground, *per* Cherry L.C.J. and Molony J., that the sub-sect. did not apply to the case of a dog *on* the public road; *per* Madden J., that it applied to dangerous dogs only. *Devaney* v. *Field* K.B. 180

EASEMENT—In gross - - - 484
See LICENCE.

EJECTMENT.
See under ACTION FOR RECOVERY OF LAND.

ELECTION—Of Chairman of Rural District Council—Obligation to elect annually—Voting at election—Time up to which member of council may vote — Quo warranto - - - - - 375
See LOCAL GOVERNMENT. 8.

ESTATE DUTY.
See under REVENUE.

ESTOPPEL—Decree in ejectment for non-payment of rent under s. 12, sub-s. 1, of the Land Law (Ireland) Act, 1896—Sub-tenant named as defendant—Subsequent action for rent by head landlord against sub-tenant—Lease for ever made prior to 1860—Relation of landlord and tenant
See LANDLORD AND TENANT. [195, 208

EX PARTE APPLICATION — Necessity for utmost good faith - - - 411
See PRACTICE. 5.

EXECUTION—Application under Order XLII, Rule 24, for leave to issue execution—When to be made ex parte, and when on notice—Costs - - - - 52
See PRACTICE. 1.

EXECUTION—*continued.*

—— Courts (Emergency Powers) Act, 1914—Costs of summons to issue execution 123 *See* PRACTICE. 2.

—— Courts (Emergency Powers) Act, 1914—Ejectment for non-payment of rent—Leave to issue execution - - 11 *See* PRACTICE. 3.

—— Courts (Emergency Powers) Act, 1914—Postponement of Payments Act, 1914—Crown debt—Annuity payable to Irish Land Commission under Land Purchase Acts—Right to judgment and execution *See* PRACTICE. 4. [66

EXECUTOR — Chain of representation — Grant during incapacity of surviving executor *See* PROBATE AND ADMINISTRATION. 1. [1

—— Death of party to action after judgment—Application by or against personal representatives for leave to issue execution—When to be ex parte, and when on notice *See* PRACTICE. 1. [52

FATAL ACCIDENTS ACT, 1846—*Damages—Apportionment—Payment into Court—Minor.*] Where money is paid into Court under the Fatal Accidents Act, 1846, and accepted in full satisfaction by the plaintiffs, one of whom is a minor, the Court has jurisdiction to apportion the money between the adul tand the minor plaintiff. *Davy* v. *Gray*, 48 I.L.T.R. 32, followed. *Cleary* v. *London and North-Western Railway Company.* [K.B. 210

FEE-FARM GRANT—Made prior to 1860—Ejectment for non-payment of rent—Relation of landlord and tenant 195, 208 *See* LANDLORD AND TENANT.

FINAL JUDGMENT—Motion for—Claim for liquidated demand — Part of claim admitted and offered to be brought into Court — Motion refused — Amount admitted subsequently brought into Court with defence—Appeal by plaintiff from refusal of motion—Judgment to be given on state of facts existing at date of re-hearing—Proper order to be made on motion for final judgment where defendant admits part of claim and offers to bring amount admitted due into Court *See* PRACTICE. 6. [402

FISHERIES ACTS—*Licence to fish for Salmon with Single Rod—Having in Possession Two Rods in Fishing Order near Fishing Place—Fisheries (Ireland) Act*, 1848 (11 & 12 *Vict. c.* 92), *s.* 29; *Fisheries (Ireland) Act*, 1869 (32 & 33 *Vict. c.* 92, *s.* 17. Section 29 of the Fisheries (Ireland) Act, 1848 (11 & 12 Vict. c. 92), provides that any person using any engine (which includes a salmon rod), or having the same erected or in fishing order, or found with the same in his possession in or near any fishing place, or going to or returning from fishing, shall, on demand by one of certain specified persons, produce "the licence for the same." Section 17 of the Fisheries (Ireland) Act, 1869 (32 & 33 Vict. c. 92), enacts that every licence "to fish with single rod and line" shall have the name and address of the person to whom same shall be sold written thereon in clear and legible characters, and such licence shall not be transferred to or available for any person except the person named therein, and any person fishing with single rod and line, without a licence so to do, shall be subject to certain penalties.

A person found with two salmon rods in his possession, both erected in fishing order, near a fishing place, on demand made by the water bailiff for the district, produced a licence in the prescribed form to fish for salmon with a single rod, but did not produce any second licence for a second rod, and had not, in fact, any such licence. He was prosecuted for having in his possession in or near a fishing place a salmon rod, and for having failed to produce a licence for the same. *Held* by Palles C.B., and Gibson, Madden, and Dodd JJ., Boyd J. dissenting, that the licence required was a licence to the person to fish with any single rod and line, and not a licence for a particular rod and line, and that the only restriction on the respondent, who had a licence for one rod, was not to use more than one rod at the same time. *Alton* v. *Irvine.* [K.B. 72

GOOD FAITH—Necessity for, in ex parte applications - - - - - - 411 *See* PRACTICE. 5.

GUARDIAN — Civil-bill Appeal — Plaintiff (respondent) becoming lunatic—Jurisdiction to appoint a guardian as next friend *See* COUNTY COURT. [116

GUARDIANS—Poor Law—Disqualification. *See* under LOCAL GOVERNMENT.

HORSE-BREEDING SCHEME—Fees paid to member of county council by committee of agriculture and technical instruction—Disqualification - 312 *See* LOCAL GOVERNMENT. 3.

HOUSE OF COMMONS—Annual allowance by Parliament to Member—Bankruptcy of Member—Order for payment of portion of allowance to assignees in bankruptcy *See* BANKRUPTCY. 1. [425

INCOME.
See SALARY OR INCOME.

INCUMBRANCE — Holding purchased under Land Purchase Acts and subject to annuity payable to Land Commission—Property passing on death — Principal Value - - - - - - 149
See REVENUE.

INFANT—Fatal Accidents Act, 1846—One of plaintiffs an infant—Money paid into Court—Apportionment - - 210
See FATAL ACCIDENTS ACT, 1846.

INSURANCE — Against fire—Right of owner of insured property to recover compensation off county for malicious burning 85
See LOCAL GOVERNMENT. 6.

INSURANCE (NATIONAL) — *Contract of Service — Employed Contributor — "Employment under any Local or other Public Authority"— Pilots appointed and licensed by Port Authority under Local Act—Pilotage Rates charged and collected by Port Authority, pooled and divided equally amongst Licensed Pilots—National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55)—*National Insurance Act*, 1913 (3 & 4 *Geo.* 5, *c.* 37), *s.* 6.] Under a local Act, the Westport Port and Harbour Act, 1853 (16 & 17 Vict. c. clxxxv), the appellants, the Commissioners of Westport Port and Harbour, were empowered at discretion to appoint and license qualified persons to act as pilots, with power at discretion to remove such licensed pilots, and appoint and license new pilots, and to suspend a license. Power to fine the licensed pilots in certain cases was conferred upon the appellants, and when that power was exercised, the fine was placed in the general harbour fund. The statute forbade pilotage except by duly licensed pilots, and made pilotage compulsory on all vessels using the port, subject, on breach of this latter provision, to payment by the master, &c., of a vessel, to the proper officer of appellants, of double pilotage. The appellants were empowered to charge and recover, as and for pilotage rates, the sums specified by the Act; to reduce, abate, or abolish such rates at discretion; and to make bye-laws or rules regulating the condition of pilotage. All rates, tolls, or charges under the statute were made applicable at the discretion of the appellants to general harbour purposes. No rule or bye-law regulating pilotage was proved. The practice of the appellants for an indefinite period of time, extending over at least thirty years, had been to receive the pilotage rates, to pool the sum so received, and pay out the same quarterly in five equal shares to the five licensed pilots of the port. *Held* (by Cherry L.C.J. and Gibson J., Dodd J. diss.), that the pilots appointed and licensed by the appellants were not employees of or under the appellants, and that the latter were not liable to contribute to insurance of the pilots under the National Insurance Acts, 1911 to 1913. *Held* by Dodd J., that, having regard to the provisions as to control of the pilots and pilotage rates; the fact that pilotage rates could be applied in part by the appellants to general purposes; and that no power was given to the pilots to bargain with or recover from the ships in respect of pilotage rates, the relation created by the local Act between the pilots and appellants was that of an "employment under" a local authority within the provisions of the National Insurance Acts, 1911 to 1913.

The above-mentioned provisions of the local Act have not been repealed by subsequent general legislation. *Westport Port and Harbour Commissioners* v. *Irish Insurance Commissioners.*
[K. B. 283

INSURANCE (NATIONAL)—*continued.*

2.——*Contract of Service—Employed Contributor — Employment under Local Authority — School Attendance Inspector—Irish Education Act*, 1892 (55 & 56 *Vict. c.* 42), *s.* 3—*National Insurance Act*, 1911 (1 & 2 *Geo.* 5, *c.* 55), *s.* 1, *sub-s.* 1, 2; *Sched.* 1, *Part* 1 (*a*)—*National Insurance Act*, 1913 (3 & 4 *Geo.* 5, *c.* 37), *s.* 6.] A person appointed as school attendance inspector by a school attendance committee under the provisions of the Irish Education Act, 1892, is an "employed contributor" within the meaning of the National Insurance Acts, 1911 to 1913, and the committee is liable for the payment of the contributions in respect of him. *O'Callaghan* v. *Irish Insurance Commissioners.*
[K. B. 262

IRISH LAND COMMISSION—Annuity payable to, under Land Purchase Acts—Crown debt - - - - - 66
See PRACTICE. 4.

—— Annuity payable to, under Land Purchase Acts — Holding subject to — Property passing on death—Principal value—Incumbrance. - - - - 149
See REVENUE.

JUDGMENT—Application under O. XLII, r. 24, for leave to issue execution on—When to be ex parte, and when on notice. 52
See PRACTICE. 1.

—— Direction to enter—Leave to issue execution —Postponement of Payments Act, 1914 —Courts (Emergency Powers) Act, 1914 —Crown debt—Annuity payable to Irish Land Commission - - - - 66
See PRACTICE. 4.

JUDGMENT—*continued.*

—— Irregularity—Setting aside—Action for return of specific goods—No appearance entered—Judgment for return of goods—No affidavit of service of writ filed 411
See PRACTICE. 5.

JUSTICES — *Summary Jurisdiction — Certiorari —Conviction quashed—Accused again charged with Same Offence — Res Judicata — Maxim,* "Nemo debet bis vexari pro eadam causa"—*Right of Unsuccessful Prosecutor to have a Case Stated.*] Where a conviction by justices is quashed on certiorari on the ground that it is bad on its face by reason of the sentence pronounced being one which the justices had no jurisdiction to award, the case is to be treated as if the conviction had not been made. The accused may be put on trial again on the same charge, and he cannot successfully avail himself of the objection of *autrefois convict* or *autrefois acquit*, either of which must have for its basis an adjudication in fact within jurisdiction. *P.* was convicted by justices at petty sessions of an offence within their summary jurisdiction, and ordered to pay a fine of £10, and, in default, to be imprisoned for three months unless the fine should be sooner paid. The conviction was quashed on certiorari on the ground that an order of imprisonment had been made without ordering first a distress. *P.* was subsequently prosecuted before the justices for the same offence, when the justices, being of opinion that the matter was *res judicata*, dismissed the summons, but stated a case for the opinion of the Court as to whether they were right in law in so doing. *Held*, that the justices were not right in law, and that the matter should be remitted to them to proceed according to law. *Conlin* v. *Patterson* - - - - K. B. 169

2. — *Summary Jurisdiction — Summons under Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 156 (*a*), *charging that the Defendant did "buy, detain, or receive" Military Property—Conviction General—One Offence—Award of Penal Sum of over* £5—*Imprisonment directed without first directing Distress—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), *ss.* 22, 23—*Certiorari.*] A summons under the Army Act, 1881 (44 & 45 Vict. c. 58), sect. 156, sub-sect. (*a*), which charges that the defendant did unlawfully "buy, detain, or receive from soldiers, or other persons acting on their behalf," military property, does not charge several offences, but one offence, under the statute, and a general conviction on such summons is not bad for uncertainty. A conviction by justices under the Petty Sessions (Ireland) Act, 1851, imposing a fine exceeding £5, and directing imprisonment in default of payment, without first ordering a distress or setting out grounds justifying a distress being

JUSTICES—*continued.*

dispensed with, is bad. If the justices hold that a defendant has no sufficient goods for a distress, that fact must be judicially determined by them, and must be set out on the face of the order. *Rex (Patterson)* v. *Justices of Tyrone* - K. B. 162

—— Licence to fish for salmon with single rod—Having in possession two rods in fishing order near fishing place - - 72
See FISHERIES ACTS.

—— Licensing Acts.
See LICENSING ACTS.

—— Member of County Council acting when disqualified.
See LOCAL GOVERNMENT.

—— Unmuzzled dog on public road - 180
See DOG.

LAND PURCHASE ACTS—Annuity payable to Irish Land Commission—Crown debt
See PRACTICE. 4. [66

—— Holding subject to annuity payable to Land Commission—Property passing on death —Estate duty—How calculated—Incumbrance - - - - - 149
See REVENUE.

LANDLORD AND TENANT — *Action for rent by Head Landlord against a Sub-tenant of Middleman under s.* 12, *sub-s.* 2, *of the Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47)—*Defendant named in and served with Ejectment Proceedings under s.* 12, *sub-s.* 1, *of the Act, and not appearing on hearing of Ejectment—Defence to Action for Rent that Defendant was not Sub-tenant to Middleman—Estoppel—Case Stated—Validity of Ejectment Decree questioned—Question of Validity of Decree not raised by the Case as stated.* Where a defendant, named in and served with ejectment proceedings under sect. 12, sub-s. 1, of the Land Law (Ireland) Act, 1896, as a sub-tenant of the middleman, does not appear on the hearing, and a decree in ejectment is granted, such defendant is estopped, in a subsequent action for rent taken against him by the head landlord under sub-s. 2 of the above section, from denying that his possession of the lands was as sub-tenant to the middleman. So *held* by the Court of Appeal, affirming the decision of the King's Bench Division. *Held*, by Palles C.B. (Madden and Boyd JJ. dissenting), that as in the ejectment decree under sect. 12, sub-s. 1, of the above Act, the middleman was described as holding under a "lease for ever" of the year 1784, it was to be presumed on the authority of *Chute* v. *Busteed* (16 I. C. L. R. 222), that at the date of the ejectment the relation of landlord and tenant did not subsist as between the head landlord and the

LANDLORD AND TENANT—*continued.*

middleman, and that consequently the ejectment decree was invalid and could effect no estoppel; and that the question for the Court being whether the defendant in the case was estopped by the decree, the Court could consider whether the decree was valid or not, even though no point or suggestion as to the invalidity of the decree appeared in the case as stated, since on a question of estoppel by judgment it is a condition precedent to the judgment operating as an estoppel that it should be valid and regular. *Held*, by Madden and Boyd JJ.—(1) That the statement in the decree that the middleman held under a lease for ever did not necessarily raise a presumption that the interest of the middleman was that of a fee-farm grantee, and (2) whether the decree was invalid or not, the case as stated must be considered by the Court as stated only on the question of estoppel arising if the decree was valid, and the case as stated must be taken to have been submitted on the agreement by both parties that the decree should be treated as a valid and regular decree. *Held*, by the Court of Appeal, that the point as to the invalidity of the decree was not open on the case as stated. *Healy* v. *Spillane*

[K. B. 195, APP. 208

—— Ejectment for non-payment of rent—Courts (Emergency Powers) Act, 1914—Leave to issue execution - - - 11
See PRACTICE. 3.

—— Relation of—Grant of permission to affix posters on wall - - 213, 448
See LICENCE.

LANDS CLAUSES ACTS—*Local Government—Compulsory Acquisition of Lands—Maps or Plans and Schedules—Requisites of—"Distinct Valuation to each Number"—Mandamus—Railways Act (Ireland)*, 1851 (14 & 15 *Vict. c.* 70), *s.* 4—*Belfast Corporation Act*, 1911 (1 & 2 *Geo.* 5, *c.* cxc), *s.* 3. Section 4 of the Railways Act (Ireland), 1851, provides that maps or plans, and schedules, of lands proposed to be taken compulsorily are to be made out, and deposited as therein provided, with the names of the owners, lessees, and occupiers, and estimates of the gross annual value and the value in fee of the lands, and that "all lands, buildings, yards and courtyards, and lands within the curtilage of any building, and ground cultivated as a garden, shall be marked thereon with distinct numbers corresponding with the numbers marked upon the Parliamentary plans of the railway, and shall have put thereon a distinct valuation to each number." A Corporation was empowered by a statute, which incorporated the Railways Act (Ireland), 1851, to acquire compulsorily lands for certain objects. They made out, and deposited as prescribed by the Railways Act (Ireland), 1851, a schedule in which, where several units marked with distinct numbers were held by the same owner in fee under the same title, a single sum representing the aggregate annual value of such units was set out, and a single sum representing the aggregate value of the fee of such units was set out, but no figures were given showing the annual value or the value in fee of each unit. On an application by the owner for a writ of mandamus directing the corporation to deposit maps or plans and schedules bearing a distinct valuation to each number: *Held*, by the Court of Appeal (reversing the order of the King's Bench Division granting such mandamus), that the schedule sufficiently complied with the provisions of section 4 of the Railways Act (Ireland), 1851, and that it was not necessary where a number of units marked with distinct numbers were held by the same owner under one title, to state the value of the fee or the annual value of each such unit. *Rex* (*Montgomery*) v. *Belfast Corporation*

[K.B. 36, APP. 45

LEASE—Lease for ever made prior to 1860—Ejectment for non-payment of rent—Relation of landlord and tenant 195, 208
See LANDLORD AND TENANT.

LETTERS OF ADMINISTRATION.
See under PROBATE AND ADMINISTRATION.

LICENCE—*Revocation—Assignment of Subject-matter to which attached—Refusal by Assignee to continue Licence—Breach of Contract by Licensor—Licensee's Right of Action Against Licensor—Demise or Licence—Easement in Gross—Qualification to Doctrine of* Tulk v. Moxhay.] By an agreement, not under seal, entered into on the 1st July, 1913, between the defendant, described therein as "the licensor," and the plaintiffs, described as "the licensees," the defendant gave to the plaintiffs permission to affix posters and advertisements to one of the walls of a picture house proposed to be erected on his property by a company about to be formed, for a term of four years, from the 1st November, 1913, or the first day the picture house should be opened for business, at a rent of £12 per annum. The agreement provided that the licensor should not, while the agreement remained in force, permit any other person to affix advertisements to the said walls, and would, if required by the licensees, take proceedings against any person who might, during the continuance of the licence, affix any advertisements to the said walls. An agreement for a lease of the site, dated the 29th August, 1913, and made between the defendant

and a trustee for the Picture House Company, provided that the defendant should assign to the trustee for the company his interest under the agreement of the 1st July, and that the trustee should, as soon as the company should be registered, obtain the ratification by the company of the said agreement. On the 2nd September, 1913, the Picture House Company was registered, with articles of association containing a provision for carrying the agreement of the 29th August into effect; and at a meeting of the directors on the 13th September, 1913, the agreement of the 29th August was ratified and adopted. On the same day the lease from the defendant to the Picture House Company was executed. It contained no reference to the agreement of the 1st July. The Picture House Company having refused the permission granted by that agreement, the licensees brought an action for damages for breach of contract against the licensor. *Held*, by the Court of Appeal, affirming the decision of the King's Bench Division, that the agreement was for a licence to continue for four years, and did not operate as a demise of any interest in land, and that as the defendant, by the execution of the lease to the Picture House Company, had put it out of his power to fulfil his obligations under the agreement, there was a breach of contract by him for which an action lay. *Held*, also, that there was no obligation on the Picture House Company to give effect to the agreement. An easement must be connected with a dominant tenement. There cannot be an easement in gross. The doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774, that an assignee of land, taking with notice of a restrictive covenant, is bound in equity by such covenant, does not apply if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into. *Allen & Sons* v. *King* [K.B. 213; APP. 448

—— To fish—Licence to fish for salmon with single rod—Having in possession two rods in fishing order near fishing place 72
See FISHERIES ACTS.

LICENSING ACTS — *Licensed Premises — Business other than Sale of Intoxicating Liquors carried on—Prohibited Hours—Billiard-room and Bar-room—Back door from each into Common Yard —"Structural Separation"—Intoxicating Liquors (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 39), *s.* 2.] Licensed premises consisted of an hotel, an open yard at the back thereof, and a billiard-room projecting from the rear of the hotel into the yard. The sale of intoxicating liquor was carried on in the bar-room, an apartment immediately adjacent to the billiard-room, and separated from it by a

wall of masonry without any opening. From the street the entrance to the yard was by a passage under part of the hotel. The hotel and the billiard-room had each a back door into the yard. To get from the billiard-room to the bar-room one had to step into the yard, and from there to the back door of the hotel, thence through a passage to the hall of the hotel, and thence through another passage to the bar-room, a distance of about 60 feet. During hours when licensed premises are required to be closed, the licensee kept the billiard-room open, but at the same time the back door of the hotel, and the bar-room door, were locked. The licensee was prosecuted for having failed to close her licensed premises as required by statute. *Held*, by Palles C.B. and Gibson J., Cherry L.C.J. dissenting, that the portion of the premises in which the sale of intoxicating liquor was carried on was not structurally separated from the billiard-room, and that the defendant had committed a breach of section 2 of the Intoxicating Liquors (Ireland) Act, 1906. *Beirne* v. *Duffy* (No. 2) [K.B. 250

2.——*Business other than Sale of Intoxicating Liquors carried on—No Structural Separation—Prohibited Hours—Bona Fide Traveller—Sale of Groceries — Intoxicating Liquors (Ireland) Act*, 1906 (6 *Edw.* 7, *c.* 39), *ss.* 2, 3. There is nothing in the Intoxicating Liquors (Ireland) Act, 1906, authorizing the sale, during prohibited hours, of anything but intoxicating liquors to bona fide travellers, and as regards the purchase by them of other commodities, they are in the same position as other members of the public. Therefore a publican who opens his premises on a Sunday to sell groceries to a person, admittedly a bona fide traveller for the purpose of obtaining intoxicating liquor, commits a breach of the Act if the portion of the premises in which such commodities are sold is not structurally separated from the portion in which the sale of intoxicating liquors is carried on. *Molloy* v. *Stack*. [K. B. 338

LIMITATIONS, STATUTE OF — *Civil-bill decree removed on Certiorari to Superior Court—Time from which Statute runs in case of such Decree*—26 & 27 *Vict. c.* 99, *s.* 9. Where a decree of a civil-bill Court is removed into the High Court by writ of certiorari under sect. 9 of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, 27 & 28 Vict. c. 99, it remains the judgment of the civil-bill Court, and the date from which the Statute of Limitations runs as against the person who obtained the decree is the date upon which the decree of the civil-bill Court was made, and not the date when the decree was removed into the High Court. *Quære*, is the

LIMITATIONS, STATUTE OF—*continued.*

effect of the removal to extend to twelve years the time within which the judgment remains unaffected by the Statute of Limitations? *Robert McCowen & Sons, Limited* v. *McCarthy.* [Palles C.B. 371

LOCAL GOVERNMENT—*Board of Guardians—Disqualification — Acting when disqualified—Previous Convictions within seven years — Local Government (Application of Enactments) Order*, 1898, *Article* 12 (11)—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *s.* 94, *sub-s.* 3. A person was convicted under the Local Government (Application of Enactments) Order, 1898, Article 12 (11), of having acted as a member of a board of guardians when disqualified, the disqualification being that within the preceding seven years he had been convicted of a similar offence. The conviction was challenged on the ground that Article 12 (11) of the Local Government (Application of Enactments) Order, 1898, did not include the disqualification resulting from conviction mentioned in sect. 94 (3) of the Local Government (Ireland) Act, 1898, and that the remedy of the prosecutor was a civil action under Article 11 (4) of the Local Government (Application of Enactments) Order, 1898. *Held*, following *The King (Hastings)* v. *Justices of Galway*, [1915] 2 I. R. 8, note, that the conviction was valid, and that Article 12 (11) of the Application of Enactments Order, 1898, included the disqualification mentioned in s. 94, sub-s. 3, of the Local Government (Ireland) Act, 1898. *Hastings* v. *O'Carroll* [K. B. 4

2.—*County Council — Disqualification — Acting when concerned in a Contract with Council—Committee of Agriculture and Technical Instruction—Committee consisting of whole Council and other Persons—Live Stock Scheme—Premium to Member of Council—Status of Committee—Local Government (Application of Enactments) Order*, 1898, *Art.* 12 (4*e*) (6) *and* (11)—*Agriculture and Technical Instruction (Ireland) Act*, 1899 (62 & 63 *Vict. c.* 50), *s.* 14. By sect. 14 of the Agriculture and Technical Instruction (Ireland) Act, 1899 (62 & 63 Vict. c. 50), county councils are empowered to appoint committees, for the purpose of assisting the Department of Agriculture in matters relating to agriculture and other rural industries, consisting partly of members of their own body and partly of other persons. The County Council of Queen's County appointed a committee of agricultural and technical instruction for the county, consisting of the whole council and of certain other persons. The respondent, a member of the committee so constituted, and also of the council, was awarded by the committee under their cattle-breeding scheme a premium in respect of a bull. This

LOCAL GOVERNMENT—*continued.*

premium entitled him to a payment of £15 and to certain fees. He was prosecuted for having acted as a member of the county council when disqualified by reason of having entered into a bargain or contract with a committee of the council. *Held*, that the County Committee of Agriculture and Technical Instruction was a committee within the meaning of Art. 12 (6) of the Local Government (Application of Enactments) Order, 1898, and that the respondent was disqualified for being a member of the county council. The expression "committee" in Art. 12 (6) of the Order of 1898 is not confined to then existing committees, but may include a committee thereafter appointed, and appointed under a new statutory authority. *Keeffe* v. *Shaughnessy.* [K. B. 105

3. —— *County Council—Disqualification—Acting when concerned in a Contract with Council — Committee of Agriculture and Technical Instruction—Horse-breeding Scheme—Fees received by member of Council — What amounts to acting as member of Council — Local Government (Application of Enactments) Order*, 1898, *Art.* 12 (4*e*), (6), (11).] A certain number of mares were, after inspection by a judge and veterinary surgeon paid and appointed by the Department of Agriculture and Technical Instruction, awarded nominations by a County Committee of Agriculture and Technical Instruction under their horse-breeding scheme. These nominations entitled the owners of the mares who received them to free, or partly free, service of their mares by any stallion on the register of the Department. The selection of the particular stallion was left to the owner of the mare. The committee paid a fee of £2 (contributed partly by the Department and partly by local rates) to an owner of a registered stallion for each nominated mare served by his stallion. The respondent, a member of the county council of Queen's County, and of the County Committee of Agriculture and Technical Instruction, was the owner of a registered stallion, and received fees for the service by his stallion of nominated mares. *Held*, that the respondent was disqualified for being a member of the county council by reason of being concerned in the contract entered into with a committee of the council. *M.*, a member of a county council, was present at a meeting of that body during the reading of the minutes of the previous meeting, and took part in a discussion on a matter not on the agenda, namely, a circular drawing attention to the disqualification of members who directly or indirectly derived any financial benefit from certain county schemes. At the close of that discussion *M.* retired from the meeting, having come to the conclusion that he was not qualified any longer to be a member of the council. *Per* Cherry L.C.J.,

M. had acted as a member of the council. *Keeffe* v. *McMahon* - - - - - - K.B. 312

4. —— *County Council—Disqualification—Acting when disqualified — Paid office under Council—Committee of Council—Local Pension Committee—Clerk of Committee — Local Government (Application of Enactments) Order*, 1898, *Art.* 12 (4) (*d*), (6), (11)—*Old Age Pensions Act*, 1908 (8 *Edw.* 7, *c.* 40), *s.* 8 — *Old Age Pensions Regulations*, 1911, *Arts.* 21 *and* 23.] A local pension committee, appointed by a county council under the provisions of the Old Age Pensions Act, 1908, and the regulations made thereunder, is a committee of the council within article 12 (6) of the Local Government (Application of Enactments) Order, 1898, and a member of the council holding the position of paid clerk of the committee is disqualified under article 12 (4) (*d*) of the Order for being a member of the council. The question what is a committee of a council within the meaning of article 12 (6) of the Local Government (Application of Enactments) Order, 1898, considered. *Lynch* v. *O'Regan* [K.B. 267

5. —— *County Council — Disqualification — Member acting when disqualified — "Paid Office under or in the Gift of the Council" — Member of Council Acting while Member of Committee of Management of Light Railway to which he was appointed by Council, and for which he received a Fee—Local Government (Application of Enactments) Order*, 1898, *Art.* 12 (4) (*d*).] An employment under or in the gift or disposal of a county council in respect of which the person employed receives any payment, however small, is a "paid office under or in the gift or disposal of the council" within the meaning of Article 12 (4) (*d*) of the schedule to the Local Government (Application of Enactments) Order, 1898, and such employment disqualifies the employee from being appointed as, or acting as, a member of the council.

A light railway, constructed under an order made pursuant to 46 & 47 Vict. c. 43, became, under sect. 10 of that statute, vested in the grand jury of the county of Kerry. Prior to the transfer of the control of the railway from the grand jury to the county council under sect. 4 (1) of the Local Government (Ireland) Act, 1898, an Order in Council was made by the Lord Lieutenant directing the grand jury to appoint as committee of management of the railway six persons who were cesspayers of the guaranteeing baronies with a valuation of not less than £20, and also directing that each ordinary member of such committee should be remunerated by the payment of a "fee" of £1, or such other sum as the Lord Lieutenant should by an Order in Council direct, and that the chairman should be paid a "salary" not exceeding £70 per

annum. After the transfer of the control of the railway to the county council, the committee was appointed by the county council. The respondent had been appointed by the county council a member of the committee of management of the railways, and received as remuneration the fee of £1, and also a free pass on the railway. While holding this appointment he acted as a member of the county council. *Held*, that the respondent held a paid office under or in the gift or disposal of the county council within the meaning of Art. 12 (4) (*d*) of the schedule to the Local Government (Application of Enactments) Order, 1898, and was, therefore, disqualified from acting as a member of the county council. *Moriarty* v. *O'Donnell* [K.B. 393

6. ——*Criminal Injuries—Compensation—Malicious Burning of Property—Owners insured against Loss by Fire—Right of Owners to recover off County —Grand Jury (Ireland) Act*, 1836 (6 *& 7 Wm.* 4, *c.* 116), *s.* 135—*Local Government (Ireland) Act*, 1898 (61 *& 62 Vict. c.* 37). *s.* 5.] Upon an application under the Grand Jury (Ireland) Act, 1836, sect. 135, and the Local Government (Ireland) Act, 1898, sect. 5, for compensation for damage caused by the malicious burning and destroying of certain premises, the fact that such premises were insured against fire cannot be taken into consideration when assessing the amount of compensation to be recovered off the county by the owner of the premises. *Ballymagauran Co-operative Agricultural and Dairy Society, Limited*, v. *County Councils of Cavan and Leitrim* - - APP. 85

7. ——*Public Health Acts—"Special Expenses"—Area of Charge—"Contributory Place" —Dispensary District co-terminous with Rural Sanitary District—Jurisdiction and Discretion of the Local Government Board to determine Area of Charge—Power to include Area not benefited— "Within the district"—"In a rural sanitary district"—Public Health (Ireland) Act*, 1878 (41 *& 42 Vict., c.* 52), *s.* 232.] The Local Government Board, in exercise of the power of determining the "contributory place" to be charged with "special expenses" under the Public Health (Ireland) Act, 1878, may determine that a dispensary district shall be the area of charge for "special expenses" incurred by a rural district council, notwithstanding that in fact that dispensary district is identical in extent with the entire of the council's rural district, and that, consequently, such "special expenses" in their incidence will be identical with the "general expenses" under the Act. Meaning of the words "within the district" and "in a rural sanitary district" in section 232 of the Public Health (Ireland) Act, 1878, explained. The area of charge of special

LOCAL GOVERNMENT—*continued.*

expenses need not necessarily be confined to the lands benefited by the works, and in determining such area the Local Government Board may take into consideration the circumstance that the place benefited would not be able to bear the expenses. *Rex* (*Ballyvaghan Rural District Council*) v. *The Local Government Board for Ireland* - K.B. 55

3.——*Rural District Council—Obligation to appoint Chairman annually—Voting at election—Member entitled to vote at any time before Close of Poll—Vote improperly rejected—Election due to such rejection invalid—Quo warranto—Statute—Construction — "May" read "Shall" — Local Government* (*Ireland*) *Act*, 1898, *s.* 23, *sub-s.* 3 (*a*), *s.* 25, *sub-s.* 1 (*b*)—*Local Government* (*Application of Enactments*) *Order*, 1898, *Article* 35 (5) (*b*).] At a meeting of a rural district council held for the purpose of electing a chairman for the ensuing year, two candidates, the relator and the defendant, were proposed. The defendant, who was also the outgoing chairman, presided at the meeting. Records of the voting were kept by the defendant and the assistant clerk. The defendant called the list of members. When the name of A was called, he did not answer immediately, and the defendant called the name of B, who was next on the list; but before B could answer, A said he would vote for the relator, and the assistant clerk recorded his vote accordingly. The defendant, however, refused to take A's vote, with the result that the election resulted in an equality of votes, the defendant declaring himself elected by his own casting vote. The relator applied for an information in the nature of a quo warranto directed to the defendant, requiring him to show by what authority he claimed to act as chairman of the council. *Held*, that if a member clearly states the name of the candidate for whom he votes, before the close of the poll, his vote ought to be accepted; and that the election of the defendant was invalid, and ought to be set aside. *Held*, also, that the words "may annually choose a chairman" in sect. 25, sub-s. 1 (*b*), of the Local Government (Ireland) Act, 1898, rendered it obligatory on a rural district council to appoint a chairman. *Held*, also, that apart from any question as to the necessity of appointing a chairman, the office was one of such importance that a disqualified person should be prevented by writ of quo warranto from acting. *Rex* (*Moore*) v. *Moriarty* - - - - - - K.B. 375

—— Compulsory acquisition of lands
See LANDS CLAUSES ACTS.

—— Rates — Town rate — Validity — Book of assessment not made up — Power to amend rate notwithstanding payment 14
See RATES.

LOCAL PENSION COMMITTEE — Paid Officer—Disqualification for being member of county council - - - 267
See LOCAL GOVERNMENT. 4.

LORD CAMPBELL'S ACT.
See FATAL ACCIDENTS ACT, 1846.

LUNATIC—Civil-bill appeal—Plaintiff (respondent) becoming lunatic—Jurisdiction to appoint next friend - - - 116
See COUNTY COURT.

MALICIOUS INJURY—Malicious burning of property — Owner insured — Right to recover compensation off county 85
See LOCAL GOVERNMENT. 6.

MANDAMUS—Compulsory acquisition of lands —Mandamus to compel deposit of maps and plans - - - - - 36, 45
See LANDS CLAUSES ACTS.

MARINER—Nuncupative will - - - 362
See PROBATE AND ADMINISTRATION. 2.

MASTER AND SERVANT — National Insurance.
See INSURANCE (NATIONAL).

—— Wilfully giving false name and address—Liability of master for wrongful act of servant - - - - - - 128
See WEEDS AND AGRICULTURAL SEEDS (IRELAND) ACT, 1909.

MENS REA—Wilfully giving false name and address—Liability of master for wrongful act of servant - - - 128
See WEEDS AND AGRICULTURAL SEEDS (IRELAND) ACT, 1909.

MERCHANT SHIPPING ACTS—Pilots 283
See INSURANCE (NATIONAL). 1.

"MORATORIUM" — Postponement of Payments Act, 1914—Crown debt—Annuity payable to Irish Land Commission 66
See PRACTICE. 4.

MORTGAGE—*Originating Summons in Chancery Division to realize Mortgage—Jurisdiction to make Order for Personal Payment—Subsequent Action in King's Bench Division on Covenant for Payment—Staying Action—Order LV, Rules* 7, 11.] Upon an originating summons issued by a mortgagee under Order LV, Rule 7, there is no jurisdiction to make a personal order for payment of the mortgage debt, and therefore if the mortgagee, pending such proceedings, brings an action in the King's Bench Division on the covenant for payment in the mortgage deed, such action will not be stayed. *Williams* v. *Hunt*, [1905] 1 K. B. 512, distinguished. *Bradshaw* v. *M'Mullan* K.B. 187

NAME AND ADDRESS — Wilfully giving false — Liability of master for act of servant - - - - - - 128
See WEEDS AND AGRICULTURAL SEEDS (IRELAND) ACT, 1909.

NATIONAL INSURANCE.
See INSURANCE (NATIONAL).

NEXT FRIEND — Civil-bill appeal — Plaintiff (respondent) becoming lunatic—Jurisdiction to appoint next friend - 116
See COUNTY COURT.

NON-COMPLIANCE WITH RULES—Proceedings taken in default of appearance without filing affidavit of service of writ — Omission not curable under Order LXXXIX, Rule 1 - - 411
See PRACTICE. 5.

OLD AGE PENSIONS ACT, 1908 — Paid officer of local pension committee—Disqualification for being member of county council - - - - - - 267
See LOCAL GOVERNMENT. 4.

ORDER AND DISPOSITION.
See BANKRUPTCY. 2.

ORIGINATING SUMMONS—To raise mortgage — Jurisdiction to make order for personal payment—Subsequent action on covenant for payment—Staying action
See MORTGAGE. [187

PARLIAMENT—Annual allowance by Parliament to member of the House of Commons — Bankruptcy of member—Order for payment of portion of allowance to assignees in bankruptcy - - 425
See BANKRUPTCY. 1.

PERSONAL REPRESENTATIVE.
See EXECUTOR.

PILOT—Appointed by Harbour Board—Liability of Board for contributions under National Insurance Acts — Westport Port and Harbour Act, 1853—Effect of provisions as to pilots in Merchant Shipping Acts, and Pilotage Act, 1913 - - 283
See INSURANCE (NATIONAL). 1.

POOR LAW GUARDIANS—Disqualification
See under LOCAL GOVERNMENT.

POOR RATE—Rateable hereditaments—Valuation — Appeal — Several tenements in occupation of same owner—Appeal as to valuation of some only of tenements — Railway—Division into separate rateable hereditaments - - 319, 328
See VALUATION ACTS.

POSTPONEMENT OF PAYMENTS ACT, 1914 — Crown debt — Annuity payable to Irish Land Commission - 66
See PRACTICE. 4.

PRACTICE—*Execution—Leave to issue—Application by Personal Representative of Judgment Creditor—Should be made ex parte—What Application under Order XLII, Rule* 24 (*a*), *should be made ex parte, and what on Notice.* Where a judgment creditor dies after judgment, an application by his personal representative for leave to issue execution should be made *ex parte*. The practice as to when applications under Order XLII, Rule 24 (*a*), should be *ex parte* and when on notice, stated. *Meehan* v. *Tynan* - - - - - K.B. 52

2.——*Execution—Leave to issue—Costs of Summons under the Courts* (*Emergency Powers*) *Act*, 1914 (4 & 5 *Geo*, 5, *c.* 78), *and the Rules of* 17*th September*, 1914, *Rule* 15, *under said Statute—Amount of Costs—Defended and Undefended Summons—Judicial discretion—Costs of Counsel.* On a summons to issue execution under the Courts (Emergency Powers) Act, 1914, where the defendant does not appear, the costs of the summons will be allowed, subject to the Judicature Rules regulating and limiting costs. In ordinary cases, where there are no circumstances to influence judicial discretion otherwise, the full costs in default of appearance are £1 10*s*., and half-costs 15*s*. Where the debtor appears and obtains the benefit of terms under the statute, unless there are particular circumstances influencing the judge to order otherwise, the parties abide their own costs. Costs of counsel will be allowed only in exceptional cases. The normal practice as to costs as above laid down does not interfere with the discretion of the judge in particular circumstances to refuse or increase costs. *Robert Watson & Co., Limited* v. *Joyce* [K.B. 123

3.——*Execution—Leave to issue—Courts* (*Emergency Powers*) *Act*, 1914 (4 & 5 *Geo.* 5, *c.* 78)—*Ejectment for Non-payment of Rent.* An action of ejectment for non-payment of rent comes within s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1914. *Perry* v. *Fitzgerald* - K.B. 11

4.——*Execution—Leave to issue—Judgment—Direction to enter—Moratorium—Postponement of Payments Act*, 1914 (4 & 5 *Geo.* 5, *c.* 11)—*Courts* (*Emergency Powers*) *Act*, 1914 (4 & 5 *Geo.* 5, c. 78)—*Irish Land Commission—Annuity—Crown Debt.* A purchase annuity payable to the Irish Land Commission under the Irish Land Act, 1903, is a Crown debt, and, as such, does not fall within the provisions of the Courts (Emergency Powers) Act, 1914, or the Postponement of Payments Act, 1914. *Irish Land Commission* v. *O'Neill* - K.B. 66

5.——*Judgment — Irregularity—Setting aside—Action for Return of Specific Goods—No Appearance entered — Judgment for Return of Goods — No Affidavit of Service of Writ filed—Non-compliance with Rules — Order XIII, Rules* 2, 8 *— Order LXXXIX, Rule* 1*—Ex parte Application—Necessity for utmost Good Faith.* The defendant having failed to enter an appearance to a writ of summons claiming the return of specific goods, the plaintiff applied *ex parte* to a judge under Order XIII, Rule 8, for an order for the return of the goods. No affidavit of service of the writ had been filed as required by Rule 2 of Order XIII. The judge's attention was not drawn to the fact that such affidavit had not been filed, and he made an order for judgment against the defendant for the return of the goods. *Held*, that the filing of an affidavit of service was essential to give jurisdiction to make the order; that the non-filing of such affidavit was not a mere non-compliance with the rules which could be remedied under Order LXXXIX, Rule 1; and that the order must be set aside.

The rule is well settled that there must be the utmost good faith on *ex parte* applications. *Crane & Sons* v. *Wallis* - - - - - App. 411

6.——*Motion for Final Judgment—Part of Claim admitted by Defendant, but amount admitted due not offered to be brought into Court—Motion refused—Amount admitted due subsequently brought into Court with Defence—Appeal by Plaintiff from Refusal of Motion—Appeal a Rehearing—Judgment to be given on State of Facts existing at Date of Rehearing—Proper Order to be made on Motion for Final Judgment where Defendant admits part of Claim and offers to bring amount admitted due into Court—Order XIV. Rules* 1, 4*—Order LVIII, Rules* 1, 4. On a motion for final judgment under Order XIV, Rule 1, where the plaintiff's claim is for a liquidated demand, and the defendant admits part of the claim, and sets up a defence as to the balance, the provision in Rule 4 of the Order that in such case the plaintiff shall have judgment forthwith for such part of his claim as is admitted, subject to such terms, if any, as to suspending execution or the payment of the amount or any part thereof into Court by the sheriff, or otherwise as the Court may think fit, does not preclude the Court, if the defendant then and there brings the money into Court to abide the order of the Court, from making no rule on the motion: and in such circumstances the Court should make no rule on the motion, with a provision for the plaintiff's costs.

The plaintiff brought an action to recover the sum of £45, the balance alleged to be due by the defendant on foot of a promissory note for £100. The defendant entered an appearance, and the plaintiff moved under Order XIV, Rule 1, for final judgment. The defendant, in an affidavit filed to resist the motion, admitted that part of the amount claimed was due, and set out facts showing a probable defence as to the balance. He stated that he was willing to pay the plaintiff the sum admitted to be due. On the hearing of the motion the defendant offered to submit to judgment for the amount admitted to be due, if accepted in full satisfaction. The plaintiff declined to accept this offer. The Court refused the plaintiff's motion with costs. The defendant subsequently delivered a statement of defence, bringing the money admitted to be due into Court, and setting out facts showing a defence as to the balance of the plaintiff's claim. After receiving this defence the plaintiff served notice of appeal to the Court of Appeal against the order refusing his order for final judgment, and asked that he should be declared entitled to judgment for the claim endorsed on the writ, or in the alternative to judgment for the sum of £15, admitted to be due, with interest. *Held*, by the Court of Appeal, that the proper order to be made on the appeal was, that, it appearing that subsequent to the order of the King's Bench Division and previous to the service of the notice of appeal, the defendant had delivered his defence, bringing into Court the amount admitted to be due, there should be no rule on the motion for final judgment, the plaintiff's costs in the Court below to be costs in the cause, and the costs of the appeal to be paid by the appellant. *Blumberg* v. *McCormick* [App. 402

——Company—Winding up—Costs of motion to Stay action against company - 310
See Company.

——Costs — Taxation — Civil-bill appeal — Case stated—Costs taxed to over £10—No objection taken to taxing master's certificate—Application to set aside certificate Proper form of certificate in such cases - - - - - 423
See Costs.

——Fatal Accidents Act, 1846—Money paid into Court—Apportionment—Infant plaintiff *See* Fatal Accidents Act, 1846 [210

——Originating Summons in Chancery Division to realize mortgage—Subsequent action in King's Bench Division on covenant for payment—Staying action - 187
See Mortgage.

PRINCIPAL AND SURETY—Building contract—Completion by sureties—Right to retention moneys - - - 384
See Building Contract.

PROBATE AND ADMINISTRATION—*Administration* de bonis non — *Grant during Incapacity of surviving Executor—Transmission of Executorship.* A grant for the use and benefit of an executor during his incapacity is equivalent to a grant of probate to him, and, should such executor survive his co-executor, the executor of the latter will not represent the original testator. A testator appointed an executor and executrix. The executor proved the will, liberty to prove being reserved to the executrix. The executor died leaving an executor. The executrix survived, and became incapable of acting, and a grant *de bonis non* with the will annexed of the testator was made to a residuary legatee for the use and benefit of the executrix during her incapacity. The executrix died intestate, leaving assets of the testator unadministered. The residuary legatee applied for a grant *de bonis non* with the will annexed of the testator. *Held*, that the grant for the use and benefit of the surviving executrix during her incapacity was equivalent to a grant of probate to her; that consequently the executor of the deceased executor did not represent the original testator; and that as the executrix had died intestate, a grant *de bonis non* should be made to the residuary legatee. *In the Goods of Frengley* PROB., 1

2.—*Nuncupative Will—Wills Act* (1 *Vict. c.* 26), *s.* 11—"*Mariner or Seaman being at Sea*"—*Female Typist employed on Liner—Document written on Shore in Contemplation of Sailing.* The deceased, who had been for several years in the employment of a steamship company as a typist, was in the habit of travelling as a typist on the vessels of the company (large ocean-liners), sailing between Liverpool and New York. She spent the periods between voyages working in the company's offices in Liverpool. Her testamentary dispositions were contained in three letters. None of these documents was signed or attested as required by the Wills Act (1 Vict. c. 26), but all, though written from the deceased's lodgings in Liverpool, were written in contemplation of sailing. The deceased was afterwards lost in the sinking of one of the ships of the company. *Held*, that every person employed in any branch of the Royal Navy or Merchant Service, from the highest to the lowest, is included, when at sea, in the exceptions contained in sect. 11 of the Wills Act (1 Vict. c. 26); that consequently the deceased came within the meaning of the term "mariner or seaman"; and that this term is not confined to the male sex. *Held*, also, that the deceased was "at sea," within the meaning of the section, at the time of making her will. *In the Goods of Sarah Hale.* [PROB. 362

3.——*Will—Mistake—Codicil referring to earlier instead of later Will—Revival.* A testator made a will, and afterwards made another which contained the usual clause revoking all prior wills or testamentary dispositions. Subsequently he duly executed a codicil, which, by mistake, was endorsed on and referred to the earlier will. *Held*, that all three documents must be admitted to probate. *In the Goods of Stedham*, 6 P. D. 205, followed. *In the Goods of Carleton.*

[PROB. 9

PROBATE AND ADMINISTRATION—*continued.*

PUBLIC HEALTH ACTS—Special Expenses—Area of charge—Contributory place—Dispensary District co-terminous with Rural Sanitary District—Power of Local Government to include area not benefited *See* LOCAL GOVERNMENT. 7. [55

PUBLIC-HOUSE.
See LICENSING ACTS.

PUBLIC POLICY — Annual allowance by Parliament to Member of House of Commons — Bankruptcy of Member—Order for payment of portion of allowance to assignees in bankruptcy 425
See BANKRUPTCY. 1.

QUIET ENJOYMENT — Covenant for — Grant of permission to affix posters on wall — Assignment of premises — Permission refused by assignee—Right of action against assignor. [213, 448
See LICENCE.

QUO WARRANTO — Office of Chairman of Rural District Council - 375
See LOCAL GOVERNMENT. 8.

RAILWAY—Valuation—Division into separate rateable hereditaments - 319, 328
See VALUATION ACTS.

RAILWAYS ACT (IRELAND), 1851—Compulsory acquisition of lands—Maps or plans, and schedules—Requisites of—"Distinct valuation to each number"
See LANDS CLAUSES ACTS. [36, 45

RATES—*Local Government—Town Rate—Validity—Rate signed by Six Members of Urban Council—Sufficiency, without further Operation of making up and signing the Book of Assessment as provided by s.* 61 *of the Towns Improvement* (*Ireland*) *Act*, 1854 (17 & 18 *Vict. c.* 103)—*Repeal of that Section—Power to amend Rate notwithstanding Payment—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *ss.* 172, 174—*Public Bodies Order*, 1904, *Art.* 72. Where an Urban District Council makes a town rate in the form prescribed by Article 72 of the Public Bodies Order, 1904, such rate being signed in the rate-book by six members

RATES—*continued.*

of the council, the rate is valid, and the further operation of making up a book of assessment to be signed by the chairman and two members, as formerly provided by section 61 of the Towns Improvement (Ireland) Act, 1854, is not necessary for the validity of the rate. That section has been entirely repealed by subsequent legislation. *R.* (*M'Kenna*) v. *Urban District Council of Monaghan*, 38 I. L. T. R. 18, considered. The power of amendment of a rate conferred upon the rating authority by section 174 of the Towns Improvement Clauses Act, 1847, may be exercised notwithstanding that the amount of the original rate has already been demanded from, and paid by, the person liable thereto. *Nagg Urban District Council and Edward Marum* v. *The Great Southern and Western Railway Company.* [APP. 14

—— Rateable hereditaments—Valuation—Appeal—Several tenements in occupation of same owner—Appeal as to valuation of some only of tenements—Railway—Division cuts separate rateable hereditaments
See VALUATION ACTS. [319, 328

RENT—Action for, by head landlord against sub-tenant under s. 12, sub-s. 2, of Land Law (Ireland) Act, 1896—Previous decree in ejectment under sub-s. 2, sub-tenant being named as defendant—Estoppel 195,
See LANDLORD AND TENANT. [208

REPUTED OWNERSHIP.
See BANKRUPTCY. 2.

RES JUDICATA—Summary conviction quashed on certiorari—Accused again charged with same offence - - - 169
See JUSTICES. 1.

REVENUE—*Estate Duty—Land purchased under Land Purchase Acts and subject to Annuity—Property passing on Death—Principal Value—Method of Ascertainment—"Incumbrance"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 7 (1) (5)—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 60 (2). The principal value, for the purposes of estate duty, of a holding purchased under the Land Purchase Acts, is the price which the property would fetch if sold in the open market, at the time of the death of the deceased, subject to the annuity payable to the Land Commission. Such annuity is not an "incumbrance" within the meaning of section 7, sub-sect. 1, of the Finance Act, 1894. *Inland Revenue Commissioners* v. *Cookman* - - - - - - K.B. 149

REVOCATION—Licence—Damages 213, 448
See LICENCE.

RULES—Non-compliance with—Proceedings taken in default of appearance without filing affidavit of service of writ—Omission not curable under Order LXXXIX, Rule 1 - - - - - - 411
See PRACTICE. 5.

RULES AND ORDERS—Rules of the Supreme Court—Order XIII, Rules 2, 8 - 411
See PRACTICE. 5.

—— Order XIV, Rules 1, 4 - - - 402
See PRACTICE. 6.

—— Order XLII, Rule 24 (*a*) - - 52
See PRACTICE. 1.

—— Order LV, Rules 7, 11 - - - 187
See MORTGAGE.

—— Order LVIII, Rules 1, 4 - - 402
See PRACTICE. 6.

—— Order LIX, Rule 38 - - - 423
See COSTS.

—— Order LXV, Rule 66 (1) (3) - - 423
See COSTS.

—— Order LXXXIX, Rule 1 - - 411
See PRACTICE. 5.

—— Courts (Emergency Powers) Rules, 1914, Rule 15 - - - - - - 123
See PRACTICE. 2.

—— Local Government (Application of Enactments) Order, 1898, Art. 12 (4) (*d*) 393
See LOCAL GOVERNMENT. 5.

—— —— Art. 12 (4) (*d*) (6) (11) - - 267
See LOCAL GOVERNMENT. 4.

—— —— Art. 12 (4) (*e*) (6) (11) - 105, 312
See LOCAL GOVERNMENT. 2, 3.

—— —— Art. 12 (11) - - - - - 4
See LOCAL GOVERNMENT. 1.

—— —— Art. 35 (5) (*b*) - - - 375
See LOCAL GOVERNMENT. 8.

—— Old Age Pensions Regulations, 1911, Arts. 21, 23 - - - - - - 267
See LOCAL GOVERNMENT. 4.

—— Public Bodies Order, 1904, Art. 72 - 14
See RATES.

RURAL DISTRICT COUNCIL.
See LOCAL GOVERNMENT.

SALARY OR INCOME—Whether annual allowance by Parliament to member of House of Commons is, within s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872 - - - - - - 425
See BANKRUPTCY. 1.

SALE—Of bread otherwise than by weight—Sale from van on public road—Prosecution by common informer - - - 342
See BREAD.

SALMON—Licence to fish for, with single rod—Having in possession two rods in fishing order near fishing place - - 72
See FISHERIES ACTS.

SCHOOLS—School attendance committee—Liability for contributions under National Insurance Acts in respect of school attendance inspector - - 262
See INSURANCE (NATIONAL). 2.

SEAMAN—Nuncupative will - - 362
See PROBATE AND ADMINISTRATION. 2.

SERVICE—Contract of.
See CONTRACT OF SERVICE.

SPECIAL EXPENSES—Public Health Acts—Contributory place - - - 55
See LOCAL GOVERNMENT. 7.

STATUTE — Construction — "May" read "shall" - - - - - 375
See LOCAL GOVERNMENT. 8.

STATUTES—6 & 7 Wm. 4, c. 116, s. 135—Grand Jury - - - - - 85
See LOCAL GOVERNMENT. 6.

—— 1 Vict. c. 26, s. 11—Wills - - 362
See PROBATE AND ADMINISTRATION. 2.

—— 1 & 2 Vict. c. 28, s. 4—Bread - 342
See BREAD.

—— 9 & 10 Vict. c. 93—Fatal Accidents 210
See FATAL ACCIDENTS ACTS, 1846.

—— 10 & 11 Vict. c. 34, ss. 172, 174—Towns Improvement Clauses - - 14
See RATES.

—— 11 & 12 Vict. c. 92, s. 29—Fisheries (Ireland) - - - - - 72
See FISHERIES ACTS.

—— 14 & 15 Vict. c. 70, s. 4—Railways (Ireland)
See LANDS CLAUSES ACTS. [36, 45

—— —— c. 92, s. 10, sub-s. 7—Summary Jurisdiction - - - - - 180
See DOG.

—— —— c. 93, ss. 22, 23—Petty Sessions 162
See JUSTICES. 2.

—— 15 & 16 Vict. c. 63, s. 22—Valuation 319,
See VALUATION ACTS. [328

—— 17 & 18 Vict, c. 103, s. 61—Towns Improvement - - - - - - 14
See RATES.

—— 20 & 21 Vict. c. 60, s. 313—Bankruptcy 347
See BANKRUPTCY. 2.

—— —— s. 319 - - - - - - 425
See BANKRUPTCY. 1.

—— 26 & 27 Vict. c. 99, s. 9—Civil Bill Courts Procedure - - - - 371
See LIMITATIONS, STATUTE OF.

STATUTES—*continued.*

—— 27 & 28 Vict. c. 52, s. 1—Valuation 319, 328
See VALUATION ACTS.

—— 32 & 33 Vict. c. 92, s. 17—Fisheries (Ireland) - - - - - 72
See FISHERIES ACTS.

—— 35 & 36 Vict. c. 58, s. 51—Bankruptcy 425
See BANKRUPTCY. 1.

—— 41 & 42 Vict. c. 52, s. 232—Public Health (Ireland) - - - - - 55
See LOCAL GOVERNMENT. 7.

—— 44 & 45 Vict. c. 58, s. 156 (*a*)—Army 162
See JUSTICES. 2.

—— 45 & 46 Vict. c. 29, s. 4 - - - 116
See COUNTY COURT.

—— 55 & 56 Vict. c. 42, s. 3.—Irish Education
See INSURANCE (NATIONAL). 2. [262

—— 57 & 58 Vict. c. 30, ss. 1, 7 (1) (5)—Finance - - - - - - 149
See REVENUE.

—— 59 & 60 Vict. c. 47, s. 12, sub-ss. 1, 2—Land Law - - - - - - 195
See LANDLORD AND TENANT.

—— 61 & 62 Vict. c. 37, s. 5.—Local Government - - - - - - 85
See LOCAL GOVERNMENT. 6.

—— —— s. 23, sub-s. 3 (*a*); s. 25, sub-s. 1 (*b*)
See LOCAL GOVERNMENT. 8. [375

—— —— s. 94 (3) - - - - - 4
See LOCAL GOVERNMENT. 1.

—— 62 & 63 Vict. c. 50, s. 14—Agriculture and Technical Instruction (Ireland)
[105, 312
See LOCAL GOVERNMENT. 2, 3.

—— 6 Edw. 7, c. 39, s. 2—Intoxicating Liquors
See LICENSING ACTS. 1. [250

—— —— ss. 2, 3 - - - - - 338
See LICENSING ACTS. 2.

—— 8 Edw. 7, c. 40, s. 8—Old Age Pensions
See LOCAL GOVERNMENT. 4. [267

—— —— c. 69, s. 140—Companies (Consolidation) - - - - - 310
See COMPANY.

—— 9 Edw. 7, c. 31, s. 5—Weeds and Agricultural Seeds - - - - - 128
See WEEDS AND AGRICULTURAL SEEDS (IRELAND) ACT, 1909.

—— 10 Edw. 7, c. 8, s. 60 (2)—Finance 149
See REVENUE.

—— 1 & 2 Geo. 5, c. 55, s. 1, sub-ss. 1, 2, Sch. 1, Part 1 (*a*)—National Insurance 262, 283
See INSURANCE (NATIONAL), 1, 2.

—— —— c. cxc, s. 3—Belfast Corporation 36, 45
See LANDS CLAUSES ACTS.

STATUTES—*continued.*
—— 3 & 4 Geo. 5, c. 37, s. 6—National Insurance [262, 283
See INSURANCE (NATIONAL). 1, 2.
—— 4 & 5 Geo. 5, c. 11—Postponement of Payments - - - - - - 66
See PRACTICE. 4.
—— —— c. 78—Courts (Emergency Powers)
See PRACTICE. 2, 3, 4. [11, 66, 123

STAYING ACTION—Costs of motion to stay action against company after petition to wind up - - - - - - 310
See COMPANY.

STRUCTURAL SEPARATION 250, 338
See LICENSING ACTS. 1, 2.

SUMMARY JURISDICTION.
See JUSTICES.

SURETY.
See PRINCIPAL AND SURETY.

TOWN RATE.
See RATES.

URBAN DISTRICT COUNCIL.
See under LOCAL GOVERNMENT.

VALUATION ACTS—*Rateable Hereditaments—Valuation—Appeal—Several Tenements in Occupation of Same Owner—Appeal as to Valuations of some of Tenements—Cause of Appeal such as to require Alteration in Valuation of Tenement as to which no Appeal—Necessity of appealing as to such Valuation also—Railway—Division into Separate Rateable Hereditaments—Valuation (Ireland) Act*, 1852 (15 & 16 *Vict. c.* 63), *s.* 22—*Valuation (Ireland) Act*, 1864 (27 & 28 *Vict. c.* 52), *s.* 1. Sect. 22 of the Valuation (Ireland) Act, 1852, gives a right of appeal to quarter sessions to any person aggrieved by the revised valuation of any tenement or tenements made by the Commissioner of Valuation, and provides that "if the cause of appeal shall be such as to require alteration to be made in the valuation of any tenement for which any other person or persons is or are liable to be rated, the appellant shall give like notice to such other person or persons, who shall, if he or they so desire, be heard upon such appeal . . ." A similar right of appeal is, by sect. 1 of the Valuation (Ireland) Act, 1864, as amended by article 37 of the Adaptation of Irish Enactments Order, 1899, given to councils of counties and urban districts, with the sanction of the poor law commissioners, such appeal to be "subject to the same conditions and provisions, and exercised in the same manner," as provided for in respect of appeals by owners and occupiers. The Commissioner of Valuation having divided premises in the occupation of the Midland Railway Co. into certain different items, (*a*), (*b*), and (*c*), upon which items he placed separate valuations, appeals to quarter sessions were served by the Belfast County Council in respect of the valuations placed upon items (*a*) and (*b*), no appeal being served in respect of (*c*). Portion of the subject-matter of valuation comprised in item (*c*) was also included in item (*b*). The Recorder, on the hearing of the appeals, was of opinion that he was bound to determine what subject-matters were legally included in the description of tenements in the valuation list in respect of which appeals had been brought, and to value the same without making any deduction in respect of any subject-matter comprised in item (*c*), but consented to state a case for the opinion of the King's Bench Division. *Held*, by the King's Bench Division (Palles C.B., and Gibson J.), that it was competent for the Belfast County Council to serve a notice of appeal in respect of item (*b*) without also serving a notice of appeal in respect of item (*c*); but that the Recorder, in arriving at the valuation of item (*b*), was bound to make a deduction in respect of any subject-matter comprised in item (*c*). *Held*, by the Court of Appeal, that in the circumstances of the case, the cause of appeal in respect of item (*b*) was such as to require alteration to be made in the valuation of item (*c*) within sect. 22 of the Valuation Act of 1852, and that it was not competent for the Belfast County Council to serve a notice of appeal in respect of item (*b*) without also serving a notice of appeal in respect of item (*c*), notwithstanding that the tenements comprised in each were in the occupation of the same owners. *Belfast County Council* v. *Commissioner of Valuation and Midland Railway Company (Northern Counties Committee)* - K.B. 319; APP. 328

WEEDS AND AGRICULTURAL SEEDS (IRELAND) ACT, 1909 — *Wilfully giving False Name and Address—Liability of Master for Wrongful Act of Servant* — Mens Rea — 9 *Edw.* 7, *c.* 31, *s.* 5.] By s. 5, sub-s. 1, of the Weeds and Agricultural Seeds (Ireland) Act, 1909, an officer of the Department of Agriculture and Technical Instruction for Ireland is empowered to enter the shop or other premises of any person who sells agricultural seeds for sowing, and examine and take samples of any agricultural seeds on the premises. By sub-s. 2 the person on whose premises a sample is taken shall, if the officer requires, give the name and address of the person from whom he procured the seeds, and if he refuses to give such name and address, or wilfully gives a false name or address, he shall be guilty of an offence under the Act, and liable on summary conviction to a penalty not exceeding £10. *Held*, that the owner of the shop in which the sample is taken is guilty of an offence

WEEDS AND AGRICULTURAL SEEDS (IRELAND) ACT, 1909—*continued.*

under the sub-section if such false name and address is wilfully given by the manager of the business, although without the authority or consent of the principal. The word "wilfully" in the sub-section means "intentionally, and not by mistake or inadvertence." *Department of Agriculture and Technical Instruction* v. *Burke* [K.B. 128

WESTPORT PORT AND HARBOUR ACT, 1853 — Provisions as to collection and application of pilotage rates not repealed by subsequent legislation - - - 283
See INSURANCE (NATIONAL). 1.

WILL—Mistake — Codicil confirming revoked will—Revival - - - - - 9
See PROBATE. 3.

—— Nuncupative—"Mariner or seaman being at sea"—Female typist employed on ocean liner — Document written on shore in contemplation of sailing - - 362
See PROBATE. 2.

WORDS—"At the time he becomes bankrupt"
See BANKRUPTCY. 2. [347

—— "Buy, detain, or receive" military property
See JUSTICES. 2. [162

—— "Contract of service" - - 262, 283
See INSURANCE (NATIONAL). 1, 2.

—— "Committee of a council" 105, 267, 312
See LOCAL GOVERNMENT. 2, 3, 4.

—— "Contributory place" - - - 55
See LOCAL GOVERNMENT. 7.

WORDS—*continued.*

—— "Distinct valuation to each number" 36
See LANDS CLAUSES ACTS.

—— "Employed contributor" - 262, 283
See INSURANCE (NATIONAL). 1, 2.

—— "Employment under any local or other public authority" - - 262, 283
See INSURANCE (NATIONAL). 1, 2.

—— "In a rural sanitary district" - 55
See LOCAL GOVERNMENT. 7.

—— "Incumbrance" - - - - - 149
See REVENUE.

—— "Mariner or seaman being at sea" - 362
See PROBATE. 2.

—— "May annually choose a chairman" 375
See LOCAL GOVERNMENT. 8.

—— "Paid office under or in gift of the council" [267, 393
See LOCAL GOVERNMENT. 4, 5.

—— "Property . . . which passes on the death"
See REVENUE. [149

—— "Salary or income" - - - 425
See BANKRUPTCY. 1.

—— "Special expenses" - - - 55
See LOCAL GOVERNMENT. 7.

—— "Structurally separated" - 250, 338
See LICENSING ACTS. 1, 2.

—— "Wilfully" - - - - - 128
See WEEDS AND AGRICULTURAL SEEDS (IRELAND) ACT, 1909.

—— "Within the district" - - - 55
See LOCAL GOVERNMENT. 7.

THE END.

BIBL. LONDIN. UNIV.